(2)

THE

# LAWS

RESPECTING

# WILLS, TESTAMENTS,

AND

# CODICILS,

AND

## EXECUTORS, ADMINISTRATORS, AND GUARDIANS,

Laid down in a *plain* and *eaſy* Manner; in which all *technical Terms of Law* are familiarly explained;

AND IN WHICH

The Statute of WILLS, and ſuch Parts of the Statute of FRAUDS and PERJURIES as relate to the Subject of DEVISES, are particularly conſidered and expounded:

WITH

REMARKS AND DIRECTIONS

For the Uſe of thoſe who are deſirous of making their own Wills.

ALSO

The METHODS of DESCENT and DISTRIBUTION of PROPERTY, WHERE NO WILL IS MADE;

As collected from the ſeveral

REPORTS AND OTHER BOOKS OF AUTHORITY,

*Up to the Preſent Time.*

CONTAINING LIKEWISE

A COMPLETE ABSTRACT of the LEGACY ACT,

An Account of the Expence of *proving* a Will, and of obtaining *Letters of Adminiſtration*; the *Stamps* on which Diſcharges for *Legacies* and *Diſtributive Shares*, are to be written, &c. &c.

WITH

AN APPENDIX of PRECEDENTS;

Compriſing a great Variety of the moſt approved Forms of WILLS, TESTAMENTS, CODICILS, &c. relative to every Deſcription of Property.

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The THIRD EDITION corrected and much enlarged.

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BY THE AUTHOR OF THE
LAWS RESPECTING LANDLORDS AND TENANTS.

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# ADVERTISEMENT

## TO THE

# FIRST EDITION.

THE following pages are intended to compoſe a ſecond diviſion of the Work we have announced to the public, under the title of LAW SELECTIONS. Till it has received the judgment of others, it would ill become us to offer an opinion of its merit or utility; the ſubject, we are ſure, will be thought of ſufficient importance to have claimed our notice, and we hope its execution will not be found leſs worthy of the public approbation than that which has already met with ſo flattering a reception.—It principally differs from other treatiſes on the ſame ſubject, 1. in its arrangement; and 2. in the particular attention which had been paid to the ſtatute of wills, and thoſe parts of the ſtatute of frauds and perjuries which affect the ſubject of deviſes; ſome of the obſervations on thoſe ſtatutes, the reader will perceive to be new, and ſome he will probably meet with in the writings of others.—The author thinks too well of the profeſſion, to fear the novelty of his ſuggeſtions ſhould depreciate their value; and he hopes he has too much integrity to propoſe difficulties, merely to perplex the noviciate, or to haraſs the learned.

# ADVERTISEMENT

## TO

# THIS EDITION.

TO the few obſervations by which the *former* impreſſions of the following ſheets were prefaced, the author has only to add that in the PRESENT EDITION conſiderable improvement has been attempted; and he hopes not in vain;—the whole has received a careful reviſal, and much new matter been introduced in every part of the work. A chapter has likewiſe been compoſed on the nature and authority of GUARDIANS, a new ſet of PRECEDENTS added, and a full abſtract ſubjoined of the late LEGACY ACT. With theſe additions, the Author flatters himſelf that the favour ſhewn by the public to the preceding Editions will not be withdrawn from that with which they are now preſented.

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| Anst. | Anstruther's Reports. |
| Atk. | Atkyn's Reports. |
| Bac. Ab. | Bacon's Abridgment. |
| Black. Com. | Blackstone's Commentaries. |
| Black. Rep. | Blackstone's Reports. |
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# INTRODUCTION.

ORIGINALLY when, by the laws of nature, property was held to be veſted in individuals by right of occupancy, it was found neceſſary, to prevent ſtrife and litigation, that the poſſeſſor ſhould have the privilege of transferring his right to others; but ſuch a privilege, as is obſerved by Sir William Blackſtone, in his admirable Commentaries on the laws of this country, would have been very ſhort and imperfect, if it had been confined to the life only of the owner; for then upon his death all the miſchiefs which the rule was introduced to prevent, would again occur in their full force. To prevent this evil, the laws of England, as well as of almoſt every other civilized country, have, from the earlieſt period we are acquainted with, allowed to every one, under certain reſtrictions, the liberty of continuing, as it were, his property after his death, to ſuch perſons as by the ties of affection or friendſhip he may be deſirous ſhould enjoy it; and if he omit making any ſuch diſpoſition of his effects, the law, for the ſame purpoſe of preventing ſtrife and confuſion, has veſted them in certain *ſpecified* individuals, excluſive of all others. The nature and effect of the inſtruments by which property is ſo continued to the nominee of the deceaſed poſſeſſor, and the deſignation made by the law where no ſuch nominee is declared, together with the office and duties of thoſe who are appointed to carry into execution ſuch inſtruments or ſuch deſignation, are the ſubjects we profeſs to treat of in the following pages; ſubjects with which it is highly fit that every one ſhould be in ſome degree acquainted, as every one will probably at one period or other be implicated in their effects.

Origin of wills.

In treating of theſe ſubjects, the firſt object of our conſideration will be to inveſtigate the nature of thoſe inſtruments by which property is allowed to be transferrable to the nominee of the deceaſed owner; theſe are

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*Wills*, *Teſtaments*, and *Codicils*; and in purſuing this inquiry, we ſhall naturally be led to conſider,

Diviſion of the work.

I. Who is by law allowed to make a will.

II. What ſpecies of property may be transferred or diſpoſed of by will.

III. Who are capable of taking by will.

IV. The requiſites to conſtitute a valid will or teſtament.

V. Of a teſtament, as diſtinguiſhed from a will or deviſe.

VI. Of the nature and effect of a codicil to a will.

VII. The means by which a will or teſtament may be annulled.

VIII. The means by which its efficacy may be reſtored.

We ſhall then proceed to that branch of our ſubject which relates to *Executors*, *Adminiſtrators*, and *Guardians*, and therein we ſhall endeavour to inveſtigate and aſcertain,

I. The office and duty of an executor, as diſtinguiſhed from an adminiſtrator.

II. The office and duty of an adminiſtrator, as diſtinguiſhed from an executor.

III. The duties and functions applicable to them both.

IV. The appointment and authority of a guardian.

And conclude with appropriate forms of wills, teſtaments, and codicils, adapted to the diſpoſal of every ſpecies of property that thoſe inſtruments are capable of tranferring.

# CHAP. I.

# OF WILLS.

## I. *As to Perſons allowed by Law to make a Will or Teſtament.*

*Who entitled to make a will;*

IT may be ſaid in general, that all perſons are permitted, by the laws of England, to diſpoſe of their property by will, unleſs under ſome *ſpecial* prohibition; for by the 32 of Hen. 8. c. 1. (as operated upon by 29 Car. 2. c. 24.) *all perſons* (except bodies politic, whether aggregate or ſole) having a ſole eſtate or intereſt in fee-ſimple, or ſeized in fee-ſimple, in coparcenary or in common, of any manors, lands, tenements, rents, or other hereditaments, in poſſeſſion, reverſion, or remainder, or any of them, or any rent, common, or other profits or commodities out of or to be perceived (*i. e.* received) of the ſame, or out of any parcel thereof, ſhall have full and free liberty to give and diſpoſe, will and deviſe the ſame, or any of them, by his laſt will and teſtament in writing, or otherwiſe at his free will and pleaſure. Our ſhorteſt way, therefore, will be to inquire, not who may, but who may not make a will or teſtament.

*who cannot make a will.*

And firſt, by 34 Hen. 8. c. 5. ſec. 14. explanatory of the laſt-mentioned ſtatute, and paſſed in order to prevent doubts which had ariſen, as to whether it extended to perſons diſabled by the common law from alienating their lands by other kinds of conveyances, it is enacted, that "a will or teſtament made of any manors, lands, tenements, or hereditaments, by any woman covert, or perſon within the age of 21 years, or an idiot, or by any perſon of non-ſane memory, ſhall not be taken to be good or effectual in law." Theſe we ſhall conſider in the order they are here mentioned, and then proceed to ſuch other diſqualifications as are acknowledged by the common law; namely, the deviſor's being under ſuch reſtraint, dureſs, or menace of impriſonment, as to deprive him of his natural liberty and freedom of will; his having been guilty of certain criminal offences; and laſtly, to thoſe

WILLS. diſqualifications which ariſe from the nature of his tenure. Firſt, however, premiſing, that the foregoing act is ſaid not to extend to the particular cuſtoms of particular diſtricts. *Perk.* 221.

Infants. The diſqualification ariſing from infancy, or being under the age of 21 years, is founded on the ſuppoſed want of diſcretion in perſons at ſo early a period of life, to diſpoſe of their property in a rational manner; on which account the law, in compaſſion to the inferiority of their judgment, and to prevent their being ſeduced by deſigning perſons to make a diſpoſition of their eſtates, contrary to their real intereſts and inclinations, has utterly diſabled them from alienating their inheritance till they are arrived at an age in which their underſtanding may be preſumed to be more ripe and mature. But if an infant renew the will by *republiſhing* it after he comes of age, it will be equally valid as it would have been if originally made at the time of ſuch republication. 1 *Sid.* 162. but in this caſe it is held that it muſt be an actual and deliberate republication, and not a *mere declaration* that the will ſhall ſtand. *Comb.* 84.

In accounting the age of an infant, it is obſervable, that the day of his birth is to be *excluded*, ſo that he is deemed of full age on the day preceding that of his birth. 1 *Salk.* 44.

The ſtatute of 34 Hen. 8. the reader obſerves, mentions only *lands* and other *hereditaments;* eſtates of an inferior deſcription, therefore, as goods, money, and other perſonal property, (being deemed of inſufficient importance to claim the notice of the legiſlature) were left to ſtand as at common law, which in reſpect of infants, are ſtill deviſeable at the age of 14 years if *males*, and 12 if *females*. No objection therefore can be made to the wills of infants above theſe ages, *merely* on account of their youth; if, however, it appear that they are unfortunately not of ſufficient diſcretion to act with the rationality common to their years, their teſtaments will be invalid, of whatever age they may be. See *Hob.* 225.

Some indeed have held, that an infant of *any age* may, at the common law, make a will. *See Perkins*, § 503; and others, that they are capable under the age of 18. *Co. Lit.* 89. b. n. (*b*). But as the eccleſiaſtical court is the judge of every teſtator's capacity, this caſe muſt be governed by the rule of the eccleſiaſtical law, which is that already mentioned.

The diſqualification of idiocy, is founded on the natural incapacity of ſuch a one to exerciſe that degree of underſtanding which conſtitutes volition. An idiot or natural fool is one who has had no underſtanding from his nativity; and is therefore deemed in law (grounded on experience) never likely to attain any; and the ſame diſability applies to others, who though not abſolutely idiots, have ſuch a weakneſs of mind as to be rendered incapable of diſpoſing of their property with underſtanding and reaſon, for per Lord *Coke*, "it is not ſufficient that the teſtator be of ſuch underſtanding or memory when he makes his will, as to be able to anſwer common familiar queſtions, but he ſhould have a *diſpoſing* memory." 6 *Co.* 23. Idiots.

To this head may alſo be referred perſons grown childiſh from age or other cauſe, who by the common law are, on a like principle of involition, incapable of making a will ſo long as ſuch diſability continues. Perſons childiſh, &c.

Alſo perſons born deaf, dumb, and blind, who never having had the neceſſary inlets of underſtanding, muſt unavoidably be too deficient to have any rational will of their own, are likewiſe, for ſimilar reaſons, incapable of diſpoſing of their property by will. *Co. Litt.* 42. 2 *Black. Com.* 496. Perſons deaf, &c. from infancy.

The third diſqualification mentioned by the ſtatute, is that of inſanity, which is alſo a common law diſability, and grounded on ſimilar reaſons of expediency, and of natural incapacity to exerciſe an act of willing. 1 *Cha. Ca.* 13. Maniacs.

The 4th and laſt diſqualificatſon by ſtatute is coverture; the principle of this diſability ariſes on a ſuppoſed want of free agency in a married woman; for as ſhe is placed by law under the coutroul, and ſubject to the will, of her huſband, all acts done by her during coverture, are preſumed to be ſo far under the influence of her huſband, as to be rather his acts than hers; ſhe is conſequently deemed wanting in that freedom of will which is neceſſary to conſtitute an independent act of the mind. *Swinb.* 78. *Dyer* 354. *Co. Lit.* 112. b. Married women.

But if the huſband be baniſhed for life by act of parliament, the wife may then make a will, and act in all things as if her huſband were dead. 2 *Vern.* 104.

The ſame diſability of the wife prevailed alſo at the common law, and therefore a married woman is equally incapable of diſpoſing of goods or chattels by will, as of lands, not only on account of the reaſon before given, but

WILLS, becauſe on her marriage the whole of her perſonal property veſts in her huſband. 4 *Co.* 51.—Yet by the licence of her huſband ſhe may make a will, of ſuch goods and other perſonal effects as he may kindly conſider as hers; and it is therefore common for the huſband, previous to his marriage, to covenant with the parents or friends of the lady, to allow her that licence. And in reſpect to the real eſtates of the wife, ſhe may by ſuch previous agreement of the huſband, and with the aſſiſtance of a fine, diſpoſe of them by will, notwithſtanding her coverture. Such *licence*, however, Sir W. Blackſtone obſerves, is more properly an *aſſent*; for unleſs it be given to the particular will in queſtion it will not be a complete teſtament, even though her huſband have previouſly given her permiſſion to make a will. 2 *Com.* 497. *Stra.* 891. Though it will be ſufficient to bar the huſband's general right of adminiſtering to his wife's effects, and adminiſtration ſhall be granted to her appointee, with ſuch teſtamentary paper annexed. *Ibid.* But ſtrictly ſpeaking, an inſtrument executed by a feme covert, in the nature of a will, does not take effect abſolutely as a *will*, conſidered as an act of the mind at the time of execution, but is to be looked upon rather as an *appointment* or dependent act, referring back to the deed or covenant by which it is created, and from which it derives all its operative faculty; yet in all other reſpects, as the external form, and its action upon the eſtate deviſed, it partakes of the nature of a will, and therefore the ſame diſqualifications which create an inability to deviſe in other caſes will extend alſo to this. See *Pow. Dev.* 168. 1 *Bur.* 431.

But it has been ſaid that if a wife be entitled to a ſeparate maintenance or pin-money, ſhe may bequeath her ſavings out of ſuch allowance, without any licence or conſent of her huſband. *Prec. Chan.* 44.

And ſo too where perſonal property of any kind has been given to a married woman for her ſole and ſeparate uſe, ſhe may bequeath it, or any ſavings thereout, without the aſſent of her huſband. 3 *Brow. Chan. Ca.* 8.

It ſeems ſcarcely neceſſary to ſay, that theſe legal reſtrictions of a married woman do not extend to ſuch goods as are in their poſſeſſion in right of another; (as the being executrix or adminſtratrix) which can never be the property, or in any reſpect liable to the controul, of the huſband.

We now proceed to mention ſuch other diſqualifications

at the common law, as are not excepted out of the ſtat. 34 *Hen.* 8. WILLS.

The firſt of which is the teſtator's being under reſtraint, dureſs, or menace, whether of death, impriſonment, or other material injury, which is *prima facie* a foundation to preſume he wanted that freedom of mind, which the law has wiſely made neceſſary, in order to the validity of a will; and thus where it appeared that a man in his laſt ſickneſs was obliged to make his will, to procure quiet from the over-importunity of his wife; it was held to have been made under reſtraint, and declared void. *Sty.* 427. 1 *Ch. Rep.* 66. Dureſs, &c.

It is to be obſerved, however, that the wills of perſons made in theſe ſituations, are not neceſſarily and invariably void, but are valid or invalid accordingly as, under all the circumſtances which attended them, the teſtator may reaſonably be preſumed to have had a free and independent will or not.

And it is to be obſerved, that theſe diſabilities of *infancy*, *inſanity*, *idiocy*, *coverture*, or *dureſs* if exiſting at the time of making the will, render it ſo entirely void, that it cannot be validated by any confirmation of the teſtator, after they are removed. 11 *Mod.* 157.

Another deſcription of perſons incapable of making a will are thoſe whoſe property is become forfeited by ſome criminal act; as,

*Traitors*, whoſe lands and tenements, from the time of the commiſſion of the offence, and goods and chattels from the time of conviction, are forfeited to the king, and conſequently no longer in the power of the criminal. 4 *Burn Ec. Law*, 54. *Swinb.* 88. Traitors.

Perſons guilty of the crime of *petit treaſon*, or of *felony*, are for a ſimilar reaſon of forfeitnre, incapable of diſpoſing of either their lands or goods. *Plow.* 258. Felons.

But there appears to be an exception in favour of lands held after the manner of gavelkind, which are not forfeited for felony. *Rob. Gav.* 75.

And the ſame diſability holds good in regard to a *felo de ſe*, or a perſon who wilfully deſtroys himſelf, as far as reſpects his *goods and chattels*, they being, by the act of ſuicide, forfeited to the king; but he may nevertheleſs deviſe his *lands*, and other *real eſtates*, which are not ſubject to forfeiture, a ſuicide not being attainted as a felon. 4 *Black. Com.* 386. *Plow.* 261. Felo de ſe.

An *outlawed* perſon is out of the protection of the law, Outlaw.

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and his goods and chattels forfeited to the king; he is conſequently diſabled from exerciſing any act of diſpoſition over his *perſonal property*, ſo long as the outlawry ſubſiſts; but of his *lands* he may diſpoſe by will, as they are not forfeited by the outlawry. 2 *Black. Com.* 499.

As to perſons guilty of offences leſs than felony, as uſurers, libellers, &c. &c. though by the civil law their wills are held to be void, they are good by the common law, which adheres to the general rule we have before taken notice of, that the laſt will of every man ſhall be obſerved, except in the particular caſes we have already or are proceeding to enumerate. *See Swin.* 90. *Perk.* § 496; *and ſtat.* 32 *and* 34 *Hen.* 8.

Aliens.

Aliens being by the laws of England incapable of poſſeſſing any *lands* or real eſtates, cannot have any to diſpoſe of; but they may acquire a property in perſonal eſtate, as *goods*, &c. and may bequeath them by will. 1 *Black. Com.* 372.

Beſides theſe diſqualifications, there ſubſiſts two others, which relate not to the perſon of the teſtator, but to his eſtate. Theſe are the holding his eſtate in jointenancy; and not being poſſeſſed of his eſtate at the *time of making* his will, but having acquired it at ſome ſubſequent period; of both which eſtates he is incapable of deviſing, as will be more particularly ſeen hereafter.

Jointenants.

*Things deviſeable.*

## II. *Concerning thoſe Species of Property which may, and thoſe which may not, be diſpoſed of by Will.*

Perſonal property.

Perſonal property, as goods and chattels of every deſcription, may be bequeathed by will; and not thoſe only which a man has at the time of making his will, but thoſe which he may afterwards acquire, will equally paſs. See *Poſt.*

Things in action.

Therefore things in action, that is to ſay, debts and other monies, &c. due to a man, but yet not in his poſſeſſion, being perſonal property, are deviſeable by will, though by the common law they cannot be granted by deed in the party's life-time. *Perk.* 511.

Deeds.

And ſo likewiſe are bonds and obligations, counterparts of leaſes, and the like. *Perk.* 527.

Emblements.

So emblements, *viz.* corn growing upon the land of tenant for life, &c. at the time of his deceaſe, may be bequeathed by will.

Dower-crops.

And by 20 Hen. 3. c. 2. The dower-crops of widows

are in like manner bequeathable; and in general whatever will go to the executor of the deceaſed in right of his executorſhip, will paſs by the teſtator's will. *Perk.* § 527.

Real property.

But as real property, unleſs by the local cuſtoms of particular places, is deviſeable only by virtue of the ſtatutes we have before noticed, (32 Hen. 8. c. 1. and 34 and 35 ibid. c. 5.) it will be neceſſary, in order to diſcover how far the power of deviſing real eſtates extends, to take a view of thoſe ſtatutes. The ſtat. 32 Hen. 8. enacts that all perſons having, or which thereafter ſhall have, any manors, lands, tenements, or hereditaments, of any eſtate of inheritance holden by or in the nature of ſocage tenure, (by which all lands except copyholds are now holden) ſhall have full and free liberty, power, and authority, to give, diſpoſe, will and deviſe the ſame, as well by his laſt *will and teſtament* in writing, as otherwiſe, *all his ſaid manors, lands, tenements*, and *hereditaments*, or any of them, at his free will and pleaſure.

Obſervations on ſtat. 32. Hen. 8.

And by 34 and 35 Hen. 8. c. 5. § 8. it is enacted, that the words "eſtate of inheritance," mentioned in the act of 32 Hen. 8. ſhall be taken to mean *eſtates in fee-ſimple only*. After which it proceeds, that all perſons having a ſole eſtate or intereſt in fee-ſimple, or ſeized in fee-ſimple, in coparcenary, or in common, of any manors, lands, tenements, rents, or other hereditaments, in poſſeſſion, reverſion, or remainder, or of rents or ſervices incident to any reverſion or remainder, ſhall have full liberty, power, and authority, to give, diſpoſe, will, or deviſe to any perſon or perſons whomſoever, by his *laſt will and teſtament* in writing, all his ſaid manors, lands, tenements, rents, and hereditaments, or any of them, or any rent, commons, or other profits or commodities, out of the ſame, or any part thereof, at his own free will and pleaſure.

Stat. 34 and 35 Hen. 8.

In conſidering theſe ſtatutes, we ſhall ſhortly enquire, 1. what things are, and 2, what things are not, within their purview.

An *advowſon* has been held to be included under the word "tenement," mentioned in the above ſtatutes, and is therefore deviſeable. *Hob.* 303.—As it is alſo under the word, "hereditament." *Cro. Eliz.* 359. 1 *And.* 21.

Advowſons.

The next preſentation to an advowſon will likewiſe paſs by the ſame word. 2 *Black. Rep.* 1240.

And on this caſe it was determined, that a deviſe of the

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*next turn* or preſentation, carried to the deviſee not merely a right of getting himſelf preſented, but the next turn of preſenting.

Donative. A *Donative* has alſo been held to be deviſeable under theſe ſtatutes. 2 *Vern.* 748.

Rents. Rents are deviſeable, as well by 34 *Hen.* 8. as alſo by cuſtom; and whenever lands are deviſeable by cuſtom, the rents iſſuing out of them are ſo too.

And theſe being *tenements*, require the ſolemnity of writing in the preſence of 3 witneſſes to atteſt their deviſe. 2 *F. Vez.* 232.

Tythes. *Tythes* alſo, of which a man is ſeized in fee may be deviſed, as coming under the denomination of hereditaments. *Sty.* 261.

Manors are deviſeable by general cuſtom, as well as by the ſtatutes. 3 *Co.* 32. b.

And franchiſes, if capable of valuation, and not reſtrained to the perſon of the grantee and his heirs, are deviſeable; and though they be not valuable, they may paſs as appurtenant to other things which are ſo. 3 *Co.* 32, 33. And ſee *Poſt.*

Annuity. An annuity in fee is alſo deviſeable under the ſaid ſtatutes. *Co. Litt.* 144.

Obſervations on ſtat. 32. Hen. 8. Having particularized the things which have been held by the courts to come within the meaning of the words, "lands, tenements, and hereditaments," in the ſtatute of 32 *Hen.* 8. we ſhall now commence our conſideration of ſtat. 34. of the ſame reign; which, in explaining the firſt of theſe ſtatutes, enacts that the words "eſtate of inheritance," uſed therein, ſhall be conſtrued to mean eſtates *in fee-ſimple only*.—But of eſtates in fee-ſimple, there are ſeveral kinds.

Eſtates in fee-ſimple abſolute. As a fee-ſimple *abſolute*, where lands are given to a man and his heirs, abſolutely without any condition or reſtriction. *Plow.* 537.

Determinable. A fee-ſimple *determinable*, which is where an eſtate is given to a man and his heirs, not abſolutely and for ever, but during ſuch period of time only as ſome other perſon named ſhall have heirs of his body, or for ſome other uncertain time. *Ibid.*

Qualified. A *baſe* or qualified fee, where ſome qualification is annexed to the eſtate, and which muſt determine whenever that qualification ends, as where bond is given to a John Talbot and his heirs, *lord of the manor of Dale*, here

John Talbot has a baſe or qualified eſtate, which determines on his or his heirs ceaſing to be lords of that manor. *Co. Litt.* 27, *Plow.* 557.

Conditional.

A fee-ſimple conditional, which is where perſonal hereditaments are given to a man and the heirs of his body, in which caſe they become abſolute and unconditional on the donee's having ſuch heir: this eſtate differs from a *determinable fee*, inaſmuch as that ſpecies of fee never becomes an abſolute fee-ſimple, but always remains in its original determinable ſtate. *Pow. Dev.* 252.

All which eſtates are clearly deviſeable under the aforeſaid ſtatutes of *Hen.* 8. the word *fee-ſimple* being there uſed in its largeſt ſenſe, and in oppoſition to eſtates tail and eſtates *pur autre vie*, i. e. for another's life. 3 *Bulſ.* 184.

Eſtates *pur autre vie*.

Eſtates *pur autre vie* are alſo deviſeable, not indeed by theſe ſtatutes, but by the ſubſequent act of 29 Car. 2. c. 3. But eſtates in jointenancy, though they may be held in fee, are yet not deviſeable, for by the death of one jointenant, his part immediately accrues to the ſurvivor. *Co. Litt.* 185. and though the eſtate be ſevered previous to the death of the teſtator, yet the will being void at its execution, the eſtate will ſurvive to the other. 2 *Bur.* 1488. *Amb.* 617.

Fee-ſimple in poſſeſſion deviſeable;

in expectancy not.

Eſtates in fee-ſimple are alſo ſaid to be either in *poſſeſſion* or in *expectancy*; they are in poſſeſſion where no intermediate eſtate ſubſiſts between the right to poſſeſs and the actual enjoyment itſelf; they are ſaid to be in expectancy, when the actual intereſt and poſſeſſion is deferred till the accompliſhment of ſome other act. The firſt of theſe eſtates is deviſeable; but the ſecond, we ſhall hereafter ſee, cannot be deviſed.

Reverſions.

Reverſions, being a preſent intereſt, though a degree removed from preſent enjoyment, come under the firſt of theſe denominations, viz. fee-ſimple in poſſeſſion, and are therefore deviſeable.

Remainders.

As are remainders, which ſtand in a ſimilar predicament.

Contingent intereſts.

Contingent intereſts, that is to ſay, eſtates or intereſts limited to take place upon a precedent condition, though reſting in mere poſſibility of taking effect, are alſo, when coupled with an intereſt, deviſeable. 3 *Bulſ.* 184. 1 *Blac. Rep.* 222. 1 *H. Blac. Rep.* 33. 2 *Bur.* 1131. 3 *T. R.* 88, 93. 1 *F. Vez.* 254. As is alſo any *equitable* intereſt.

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After having particularly enumerated all the various eſtates and intereſts which *are* deviſeable, it may be thought unneceſſary to proceed to thoſe which are *not* ſo; but as our treatiſe is intended as well for the uſe of unprofeſſional men, as for the aſſiſtance of novitiates in the profeſſion, we think we cannot be too explicit, and ſhall therefore briefly mention thoſe ſorts of eſtates and intereſts which are held not to be within the purview of the ſtatutes of wills, and which conſequently are not deviſeable.

*Things not deviſeable.*

Eſtates held in jointenancy, it has been before obſerved, are not deviſeable, and as the ſtatute 32 Hen. 8. requires that the deviſor ſhould be *ſeized of* the deviſed eſtate at the time of making his will, lands *afterwards* purchaſed will not paſs by a will previouſly made, unleſs it be renovated by republication. 1 *F. Vez.* 255. 2 *Ib.* 427. Yet by the favour of courts of equity, if the teſtator has *contracted* for the purchaſe, ſo that he has the *equitable* eſtate in him at the time of making his will, and the words of the will are ſufficiently comprehenſive to include the eſtate, it will paſs without a republication. *Prec. Ch.* 320. 2 *Peere Wms.* 629. 1 *Vez.* 437. and 1 *Brow. Ch. Ca.* 226.

But it is to be obſerved, that theſe obſervations apply to *freehold* eſtates only, for as to *perſonal* property, as terms for years, goods, &c. they will paſs, though not in the teſtator's poſſeſſion at the time of making his will, the reaſon of which, as ſtated by *Parker, C. J.* is that "though the freehold lands ſhould not paſs by the will, there is ſtill a perſon in law capable of taking them, viz. the *heir*; but in regard to the perſonal intereſt, if the executor ſhould not take them, it is uncertain who ſhall." 1 *Peere Wms.* 575.

Eſtates held in mortgage will paſs by *an expreſs* deviſe thereof by the mortgagee, but it ſhould ſeem not by *general* deviſe by way of reſidue. See *Co. Litt.* 8, 203. n. 96. and 3 *Vez. jun.* 348.

Eſtates turned to *a right.*

An eſtate turned to *a right*, as a reverſion diſcontinued, is not within the purview of theſe ſtatutes, and not deviſeable. *Cro. Car.* 387. 405.

Titles of dignity.

Titles of dignity, as dukedoms, earldoms, &c. (though formerly they paſſed as annexed to the eſtate) are not now deviſeable, being held to be perſonal and not territorial rights.

Offices and corrodies.

Offices and corrodies, being things annexed only to the perſon of the poſſeſſor, are likewiſe indiviſeable. *Pow. Dev.* 41.

Franchiſes alſo, when merely perſonal and not appendant to lands, fall under a like predicament. *Ibid.* And though not merely perſonal, yet if ſuch franchiſes are of ſuch a nature as that no certain annual value can be ſet upon them, they are ſtill indiviſeable. 3 *Co.* 32. 10 *Ibid.* 81. Franchiſes.

And for a ſimilar reaſon, their not being capable of any certain valuation, commons without ſtint, ways and the like, cannot be the ſubject of a deviſe. *Cro. Eliz.* 359. 2 *And.* 22. Commons without ſtint.

The foundation of the diſtinction between hereditaments capable of valuation, and thoſe which are not, ariſes on the wording of the ſtatutes of wills, which required a third, &c. of the *annual value* of inheritances, (according to the ancient tenures then in uſe,) to be reſerved for the cuſtody of the king, &c. which were held to imply that ſuch inheritances as could not be vulued, were not deviſeable, thoſe ſtatutes being the only authority for deviſing inheritances. See *Pow. Dev.*

Copyhold eſtates, or eſtates held by copy of court-roll, are not deviſeable, they being excepted out of the ſtat. 29 Car. 2. c. 24. which by converting all *other* eſtates into ſocage tenure rendered *them* deviſeable by the ſtatute of wills. And ſee 2 *Brow. Ch. Ca.* 56. Copyholds.

But though copyhold lands are not actually deviſeable, yet a teſtamentary power may be indirectly exerciſed over them by an application of the doctrine of uſes, by previouſly ſurrendering them to the uſe of the owner's will, when they become ſubject to the uſes in ſuch will declared, and will therefore paſs to his deviſee in like manner as any other eſtate, though it is not in truth by the will, but by the ſurrender that the eſtate is transferred; unleſs therefore they be previouſly ſurrendered to the uſe of the teſtator's will they will not paſs thereby. 3 *Vez. Jun.* 191.

The goods and chattels belonging to colleges, hoſpitals, and other aggregate corporations, are not ſubject to any teſtamentary diſpoſition, made by the maſter or head thereof. *Plow.* 525. Nor are the goods, &c. of the church bequeathable. *Ibid.* Property of corporations. Goods of the church.

## III. *As to Perſons capable or not capable of taking by Will.*

We may here make a ſimilar obſervation to that which we made in the firſt ſection of our preſent inquiries, namely, that every perſon not labouring under ſome legal diſability is capable of taking by will. *Who may, and who may not, take by will.*

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As to married women.

Coverture is no disability in a woman to take a devise; for though at law she cannot take without the consent of her husband, yet a court of equity will oblige him to give his consent. *Perk.* 43. Though Perkins speaks only of a *conveyance* to a wife, the principle and the law is the same in respect of a *devise*.

Nor is a married woman disabled from being a devisee to her husband; for the reason of law which disqualifies her from taking a grant from her husband, because "husband and wife are one person," does not hold in the case of a devise, which does not take effect till after his death. *Co. Lit.* 112. b. 1 *Eq. Ca. Abr.* 173.

Aliens.

Nor is an alien, as such, incapable of being a devisee; but it becomes a question for whose *use* he will hold the devise; and it seems that he can hold no longer than till office found, when it will be forfeited to the king, and if he die before office be found, it will also go to the king, in want of heirs in the alien to inherit. 9 *Co.* 141. *Gouldb.* 102. 2 *Vez.* 360.

Catholics.

And since the stat. of 18 of the present king, repealing so much of the 11 and 12 Will. 3. c. 4. as disabled persons professing the Roman Catholic religion from holding lands, papists are capable of being devisees, on their taking and observing the oath prescribed by that statute.

Bastard.

A bastard whilst an infant cannot take by devise, because he has no name by which he may be identified; but after he has gained a name, by reputation, he may take by that description. *Co. Lit.* 3. b. *Dyer* 313.

Infant unborn.

But a legitimate infant though unborn may take by devise. 2 *Lev.* 135. 2 *Keb.* 300.

Nor can illegitimate children take under the general description of *sons and daughters*, nor will evidence be admitted that the testator intended they should. 3 *Anstr.* 684.

The persons we have as yet mentioned, as capable of taking by devise, are those who stand in their own proper and *natural* capacities; we shall now consider those who stand in a *civil* capacity.

These may be either in *esse* or not in *esse*, at the time of the devise. Civil persons in *esse* as *executors*, &c. may take in such their capacity of *executor*, &c. as well as in their natural capacity.

Civil persons,

But civil persons not in *esse* may likewise, under particular circumstances, take by devise, if it appear to be the intention of the devisor that they should; as when a

deviſe is made to the executors of executors, in their civil capacity. *Ibid.*

*Pariſhioners* are alſo held to be incapable of taking lands as deviſees in that character. *Pow. Dev.* 336.

Nor can a deviſe of land, or of any thing chargeable upon or payable out of land, be made to any charitable uſe; of which ſee more particularly 2 *Black. Com.* 273. and 2 *Burn. Eccl. Law. Tit. Mortmain.*

## IV. *The Formalities requiſite to conſtitute a valid Deviſe.*

*Requiſites to make a good deviſe.*

We have already ſeen what is requiſite to conſtitute a valid will, as far as relates to the *deviſor*, the *things deviſed*, and the *deviſee*; we now proceed to the will itſelf, in order to conſider the formalities, required by law, to render it valid and efficacious. In this reſpect there is a material difference, between a will, deviſing *eſtates of inheritance*, and a teſtament, bequeathing only perſonal property. For eſtates of inheritance being, in the eye of the law, of higher regard than mere perſonal property, the legiſlature has required certain ſolemnities to accompany the diſpoſition of ſuch eſtates, with a view of guarding men *in extremes*, (that is, at their laſt moments, when their mental faculties may be deranged or impaired) from the liability of impoſition; and alſo to protect the heir at law from being diſinherited by his anceſtor, at a time when he might be incapable of due reflection: but no particular formalities, as we ſhall ſee hereafter, is required to accompany the diſpoſal of property merely perſonal.

Obſervations on Stat. 29 Car. 2.

In regard to eſtates of inheritance, it is enacted by 29 Car. 2. c. 3. (uſually ſtiled the ſtatute of frauds and perjuries), "that all *deviſes and bequeſts*, of any lands or tene-" ments deviſeable, either by common law, that ſtatute, " or the ſtatute of wills, or by force of the cuſtom of " Kent, or the cuſtom of any borough, or any other par-" ticular cuſtom, *ſhall be in writing*, and *ſigned by the party* " ſo deviſing the ſame, or by ſome other perſon *in his pre-*" *ſence*, and by his expreſs direction, and *ſhall be atteſted* " and ſubſcribed, in the preſence of the deviſor, by *three* " *or more credible witneſſes*, or elſe ſuch deviſes or bequeſts " ſhall be utterly void and of none effect."

We ſhall conſider this ſtatute in four points of view: 1. As to the conſtruction of the words, "deviſes and bequeſts." 2. The *eſtates* to which the ſtatute extends. 3. What ſhall be deemed a ſufficient *ſigning*, by the teſ-

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tator, and by the witneſſes, under the ſtatute. 4. Who are conſidered to be *credible* witneſſes.

1. Conſtruction of the words "*deviſes and bequeſts.*"

1. As to the conſtruction of the words "*all deviſes and bequeſts.*" Theſe being the firſt material words in the clauſe we are conſidering, it is obſervable, that the legiſlature has not in this ſtatute, (and we have likewiſe ſeen that it did not in the ſtatute of wills), preſcribe any particular form of words, in which a deviſe ſhall be conceived: what would have been ſufficient, therefore, before this ſtatute, will be ſufficient ſince; it follows, then, that any writing having the formalities of publication required by this ſtatute, and indicating the intention of the teſtator, to diſpoſe of his lands or hereditaments by will, (provided ſuch intention be not contrary to the rules of law,) will amount to a good deviſe.

Upon this ground it has been determined, that even a *deed*, if made with a view to the diſpoſition of a man's eſtate after his death, will conſtitute a good deviſe. *Finch* 195. 1 *Chan. Ca.* 248. 4 *Brow. Ch. Ca.* 353. 2 *F. Vez.* 235.

And ſo where it appeared from inſtructions given to an attorney, that the intention of the teſtator was to make a *will*, though a deed of conveyance was made, and *delivered as ſuch*, yet it was held to operate as a *will*. 1 *Mod.* 117. 3 *Keb.* 310. 1 *Show.* 69.

And upon the ſame principle, words of *deſire* or *requeſt* only, in a will, will create a truſt in the executors to ſatisfy the requiſition of a teſtator. 2 *Brow. Ch. Ca.* 38. 226. And ſo minutely do the courts regard the intention, that ſhould the teſtator expreſs himſelf incorrectly, they will ſupply the omiſſion of words, and other miſtakes, in order to effect it. 3 *Brow. Ch. Ca.* 494. 1 *F. Vez.* 362. *Ib.* 444. And they will for the ſame purpoſe take into conſideration the ſituation of the teſtator and his family. *Ibid.* 441. and ſee 1 *F. Vez.* 1. 75.

A deviſe will alſo be good, and operate as ſuch, (and not as a will and codicil,) though made at various times, and by ſeveral diſtinct memorandums, if it was intended by the teſtator to conſtitute one entire will, and it be properly ſigned and delivered. 1 *Bur.* 548. 2 *F. Vez.* 228.

But the whole will muſt be preſent at the time of atteſtation by the witneſſes. 3 *Mod.* 263. 1 *Eq. Ca. Ab.* 401. Unleſs, however, poſitive proof is adduced that it

was *not*, it will be left to the jury to find whether it was or not, under all the circumſtances. 3 *Bur.* 1773.

And ſo a man may make ſeveral diſpoſitions of ſeveral parts of his eſtates, by ſeparate and diſtinct inſtruments, which will be conſidered in law, if not contradictory to one another, as conſtituting but one deviſe. 1 *Show.* 543. 553.

He may alſo make ſeveral and diſtinct wills of *different* intereſts, in one and the ſame eſtate. *Cro. Eliz.* 721. 1 *Vez.* 187.

So likewiſe may a latter deviſe modify and qualify a former. 2 *Atk.* 268. And may be made to take effect by reference to another inſtrument. *Cro. Jac.* 144. 2 *Atk.* 273.

In truth the intention of the teſtator is ſo entirely regarded, that, as we have ſaid before, any kind of diſpoſition, not expreſsly contrary to the rules of law, will conſtitute a valid deviſe.

2. Concerning the eſtates to which the ſtatute extends. *2. Eſtates comprized in the ſtatute.*

Theſe we have already pretty fully conſidered in a former ſection, and have only here to add, that the ſtatute does not extend to lands, &c. within any of our colonies or plantations; to which acts of parliament do not extend, unleſs where they are particularly named. 2 *Peere Wil.* 75.

But if the lands be ſituated in England, the will muſt be publiſhed conformably to this ſtatute, though it be made abroad. *Ibid.* 291.

We may here obſerve too, that though the ſtatute does not affect any diſpoſition made of perſonal eſtates, yet a term of years *attendant on the inheritance* has been held to be within the ſpirit of the act; for ſuch a term will in equity go to the heir, and not to the executor, and is in that reſpect to be conſidered as part of the inheritance. *Ibid.* 236. And *note*, it was ſaid in this caſe, that every ſpecies of eſtate which would deſcend to the *heir*, muſt be deviſed according to the ſtatute of frauds. 2 *Atk.* 72. 2 *Wilſ.* 329.

And ſo too the deviſe of a *truſt* of inheritance requires the ſame ſolemnities, for otherwiſe the ſtatute would be nugatory, and the ſame danger of fraud be incurred as by a deviſe of a legal eſtate in fee ſimple. 3 *Atk.* 152.

And when a power is given to appoint uſes and truſts of lands, the will appointing thoſe uſes muſt be executed

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according to this ſtatute, for ſuch caſe is alſo within all the inconveniencies which the ſtatute was made to prevent. And though the power of appointing is effected by other writing in *the nature of a will*, it is the ſame. 1 *P. Wms.* 740. 2 *Ibid.* 258.

And if a will deviſing lands to a college, &c. be void under the ſtatute of frauds, it will not enure as an *appointment*, by virtue of 43 Eliz. c. 4. for the ſtatute is to be ſtrictly conſtrued to prevent fraud. 2 *Vern.* 597.

And when a legacy, or other ſum of money given by will, is primarily charged out of land, the will muſt be made and publiſhed with all the ſolemnities required to paſs the land itſelf; for as the money can be raiſed only by ſale or other diſpoſition of the land, it is conſidered in a court of equity as a deviſe of ſuch land. 2 *Atk.* 268—285. Rents likewiſe, if ariſing out of land, are in a ſimilar predicament, being comprized in the word "tenement," mentioned in the ſtatute. 2 *Vez.* 179. 2 *F. Vez.* 232.

Copyholds, we have formerly ſeen, are not within the ſtatute under conſideration. A will, therefore, directing the uſes of copyhold lands, in purſuance of a previous ſurrender for that purpoſe, is not ſubject to the formalities required by this act. 2 *Brow. Ch. Ca.* 56.

But though copyholds are excepted out of the ſtatute, yet it was held by the maſter of the rolls, in Hilary vacation 1727, that where a copyholder was ſeized of a truſt, or equity of redemption only, of a copyhold, ſuch truſt, &c. could not be deviſed but by a will executed according to the ſtatute, becauſe there could be no preſent ſurrender to the uſe of the will to paſs this truſt; and it was no prejudice to the lord to comprize the truſt of a copyhold within the ſtatute, as the perſon who has the legal eſtate is liable to anſwer all the ſervices. *Ibid.* 261. and *Sel. Ca. Chan.* 42.

Lord Hardwicke, however, was of a different opinion, and held that the truſt of a copyhold would paſs by a will not executed according to the ſtatute, as a copyhold ſurrendered to the uſe of a will would do, for that equity ought to follow the law, and make it at leaſt a legal intereſt. Vid. 2 *Peere Will.* 261 in notes; and 2 *Vern.* 597. And the ſame point was afterwards again agitated before his lordſhip, and received a like determination. 1 *Vez.* 229.

3. As to the formality of ſigning, and publication, by the teſtator, and the atteſtation and ſubſcription of the witneſſes.

*3. Signing by teſtator and by the witneſſes.*

Very ſoon after the paſſing of the ſtatute under our conſideration, doubts aroſe as to the conſtruction to be put on the word *ſigned*, viz. whether it ſhould be conſtrued in its ſtrict and ordinary ſenſe, or whether it ſhould be expounded liberally, ſo as to leave it open to the conſtruction of intention, to be inferred from the particular circumſtances of each caſe. The latter conſtruction at firſt prevailed, and it was adjudged, in a caſe of Warnford and Warnford, 2 *Stra.* 764, that *ſealing* a will was a ſufficient ſigning, within the ſtatute; but that doctrine has been ſince over-ruled, and it is now held that ſealing alone, without any ſignature by the teſtator, is inſufficient. 1 *Wilſ.* 333. 3 *Atk.* 486 (note).

Signing by teſtator.

As the ſtatute however does not ſay in what part of the will the ſigning ſhall be, a will was held to be good, which was no otherwiſe ſigned than by the teſtator's beginning his will by his name:—"I *John Stanley*," &c. in his *own hand-writing*. 3 *Mod.* 219. 1 *Eq. Ca. Abr.* 403.

But if the name of the teſtator be not actually written by himſelf, (or by his expreſs direction) no *intention* to ſign is ſufficient, though attended with the ſtrong circumſtance of his having made an *effort* to do it; for however willing the courts may be to conſtrue wills in ſuch a manner as to effectuate the intention of the teſtator, yet they cannot go ſo far as to give effect to a *conſtructive* ſigning, upon a preſumed intention. *Doug.* 241.

The ſigning of the teſtator muſt alſo be accompanied by a *publication*, *i. e.* a declaration that the inſtrument is his will; for though this is not required by the ſtatute of frauds, yet, as it was eſſential to the validity of a will at common law, and there is nothing derogatory from it in the ſtatute, it ſtill remains an indiſpenſable part of the execution. But as no particular form of words is required in the publication of a will, it has been held that the delivering it *as a deed* was a ſufficient publication, particularly as inconveniencies might ſometimes ariſe in a family, from its being known that a perſon had made his will. *Burn. Eccl. Law.* 117. 8 *Vin. Ab.* 125.

Publication by teſtator.

And therefore in the publication of a will, it is not neceſſary that the witneſſes ſhould be made acquainted with its contents; the teſtator's declaring it to be his will,

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"that his will is contained therein," or the like, is all that is in any caſe requiſite, ſo that the witneſſes be able to prove the identity of the writing, that is to ſay, that it is the ſame which the teſtator in his life time affirmed to be his will. *Swinb.* 52. 3 *Bur.* 1773.

A publication has alſo been *inferred* from circumſtances of deliberate execution by the teſtator, in the preſence of the witneſſes, and deſiring them "to take notice," without any words declaratory of the inſtrument's being his will. *Burn Eccl. Law*, 114. See alſo, *Com. Rep.* 197.

It ſhould however be obſerved, that the caſe referred to in *Burn*, met with much oppoſition from the plaintiff's counſel; who inſiſted that the queſtion, whether a good publication or not, ſhould be reſerved for a caſe to be argued in the courts above; but the matter was afterwards compromiſed by the parties.

Subſcription & atteſtation of the witneſſes.

The atteſtation and ſubſcription of the witneſſes, in the preſence of the teſtator, is required by the ſtatute, principally with a view of putting a ſtop to the ſecret manner in which, previous to an intended fraud, wills were executed. But the buſineſs of the perſons atteſting the execution of a will, is not *barely* to witneſs the *manual* act of ſigning, but alſo to bear teſtimony of the *ſanity* of the teſtator; for as it is neceſſary, from the nature and import of the inſtrument, that the teſtator ſhould, at the time, be poſſeſſed of a ſound and diſpoſing mind, the courts have held, that the legiſlature muſt by implication have required them to atteſt that requiſite, as well as the ſimple act of ſigning, which it may be obſerved is the reaſon that a will is not permitted to be proved, as a deed is, by an exhibit *vivâ voce* in court. See 3 *Peere Wil.* 63.

The ſame liberal conſtruction has been allowed on the import of the word "atteſted," in the ſtatute, as in reſpect of the word "ſigning;" wherefore it is held not to be neceſſary that the witneſſes ſhould actually ſee the teſtator ſign his name, ſo that he acknowledge to them that the name is of his ſignature. 3 *Peere Wil.* 252. 2 *Vez.* 455. *S. C.* 1 *F. Vez.* 11.

But *note* that where a will was executed, firſt in the preſence of two witneſſes, and afterwards in the preſence of a third, and the teſtatrix ſaid, "This is my will," and deſired the witneſs would atteſt it, but did not acknowledge her ſignature; Lord Hadwicke expreſſed a doubt as to its validity. 2 *Atk.* 182.

Though the witneſſes muſt all atteſt the execution of the teſtator's will in *his* preſence, yet it is not neceſſary that it be done in the preſence of each other, 2 *Atk.* 176. But in this caſe it ſeems the better opinion, that the teſtator muſt acknowledge the ſignature of his name to be his, in the preſence of each. *Ibid.* 2 *Vern.* 429. *Prec. Chan.* 184. 1 *F. Vez.* 16.

It however become us to remark, on the caſe in *Atk.* that though the witneſs's atteſting at ſeveral times does not invalidate the will, yet it is by much the ſafeſt way that all three witneſſes be preſent at the ſame time; becauſe if one of the witneſſes who ſubſcribed ſeparately ſhould die, it might be difficult to prove the will, as the ſurviving witneſſes would not be able to prove the ſubſcription of the witneſs deceaſed, and the hand-writing of the teſtator would not be admitted where there were living witneſſes.

And where the witneſſes atteſt the execution ſeparately, it muſt be one and the ſame paper or inſtrument which they all atteſt; for their ſeparate atteſtation of different wills will not, when put together, make a good atteſtation of the whole: as where a man, after making a will of lands, atteſted by *two* witneſſes, made a codicil, in which the will was recited, and the codicil was atteſted by one of the former witneſſes and another; the court held ſuch an atteſtation to be inſufficient. *Carth.* 35. 1 *Show.* 68. 88. *S. C.* 3 *Mod.* 262.

And where a teſtator made his will unatteſted, and afterwards made a codicil which referred to the will, and was properly executed and atteſted; yet as it did not appear that the will was produced when the codicil was ſigned, the atteſtation was adjudged bad. *Gilb. Rep.* 5.

And where the will and codicil were upon one ſheet of paper, and the manner of ſubſcription, required by the ſtatute was complied with, it was held to be a fact to be left to the jury, whether, under all the circumſtances, the atteſtation ſhould be conſidered as referring to both inſtruments, or only to one of them. *Com. Rep.* 531.

But it is immaterial in what form, or on what part of the will, the atteſtation is made; it will therefore be good, though each witneſs write his name on ſeparate ſheets of the will, and that although the ſheets be not tacked together. 3 *Bur.* 1775. *Com Rep.* 410.

In the teſtator's preſence.

The next doubt which occurred on the conſtruction of

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the clauſe we are conſidering, was on the words "in the preſence of the teſtator."

And it is held, that if the witneſſes, at the time of their atteſtation, are within the view of the teſtator, ſo that he *may* ſee them ſubſcribe their names if he will, it is ſufficient, though they be not actually in his *preſence*, but in another room. 1 *Eq. Ca. Ab.* 403. *Salk.* 68. 395. 1 *Brown*, 99.

In the caſe here referred to, the teſtatrix was in her *carriage* whilſt the witneſſes atteſted her execution in an office, where it was ſworn ſhe *might have* ſeen them.

But unleſs the teſtator be in ſuch a ſituation as that it is *poſſible* for him to ſee the act of ſubſcription, it will be bad, though done *literally* in his preſence, for the reaſon of the requiſite is to guard againſt fraud in ſubſtituting another will in the room of the teſtator's. *Carth.* 79. *Comb.* 156. *S. C. Ca. Temp. Holt*, 222. 1 *Show.* 89. 1 *Peere Wil.* 239.

And it will make no difference if the witneſſes ſhould retire at the *expreſs deſire* of the teſtator. 2 *Show.* 288.

And on the principle of the clauſe being intended for the prevention of fraud, it has been ſaid, that though the will be atteſted in the ſame room with the teſtator, and he might have ſeen the witneſſes if he had choſen, yet if the ſubſcription be made in a ſecret and clandeſtine manner, the deviſe will ſtill be void, per Lord Cowper. 1 *Peere Wil.* 740.

And ſo where the teſtator was proved to be *inſenſible* at the time of the witneſſes ſubſcription, it was held not to be a ſufficient atteſtation within the ſtatute, though done in his preſence. *Doug.* 229.

*Note.* In Hands v. James, Com. 531, it was decided that the queſtion, whether preſent or not, was a fact for the opinion of the jury, under all the circumſtances of the caſe. And ſee 2 *Stra.* 1109, where it was determined not to be neceſſary for the atteſtation to ſet forth that the ſigning was in the teſtator's preſence, as that will be *preſumed*, unleſs the contrary be proved.

*4. Credibility of witneſſes.*

4. As to the credibility of witneſſes to a will.

The laſt eſſential words in the teſtamentary clauſe of the ſtatute, are "credible witneſſes."

The incompetency of witneſſes on account of their incredibility, ariſes, 1. from their being intereſted; 2. from their having been convicted of ſome infamous crime.

Interested witneſſes.

1. From being intereſted; and on this ground it was formerly held, that where a perſon was a deviſee, or to receive any benefit under the will, he was an incompetent witneſs under the ſtatute, becauſe he was intereſted in its eſtabliſhment, and therefore had a temptation to perjury, which it was the end of the ſtatute to guard againſt. 2 *Stra.* 1253. 1 *Lord Raym.* 505.

But after the determination of this point, it became a ſerious conſideration, whether, in purſuance of this doctrine, many juſt wills might not be called in queſtion, on account of fees due to the teſtator's apothecary, or wages to his ſervants, who being uſually about him at a time of ſickneſs, are the moſt likely perſons to be called upon to atteſt the execution of his will.

To prevent theſe inconveniences, therefore, and to remove the doubts which had ariſen on the conſtruction of the word "credible," in the 29 Car. 2. it was enacted by 25 Geo. II. c. 6. that any perſon who ſhall atteſt the execution of any will or codicil thereafter to be made, to whom any beneficial deviſe, legacy, eſtate, intereſt, gift, or appointment, of or affecting any real or perſonal eſtate, (except charges on lands, tenements, and hereditaments for payment of debts) ſuch deviſe, legacy, eſtate, intereſt, gift, or appointment, ſhall be null and void, ſo far only as concerns ſuch perſon atteſting the execution of ſuch will or codicil, or any perſon claiming under him; and ſuch perſon ſhall, notwithſtanding, be admitted a witneſs to the execution thereof, within the intent of the act of 29 Car. 2. c. 3.

"And in caſe any lands, tenements, or hereditaments, ſhall, by will or codicil, be charged with any debts, and the creditor thereof ſhall atteſt the execution of ſuch will or codicil, ſuch creditor ſhall, notwithſtanding, be admitted as a witneſs within the intent of the ſaid act."

"And if any perſon ſhall atteſt the execution of any will or codicil then made, to whom any legacy or bequeſt ſhall be thereby given, whether the ſame be charged on lands, tenements, or hereditaments, or not, and ſuch perſon, before he give teſtimony concerning the execution of the ſaid will or codicil, ſhall have accepted, or have refuſed to accept ſuch legacy or bequeſt on tender thereof, he ſhall be admitted a witneſs within the intent aforeſaid."

Notwithſtanding this act, however, queſtions ſtill aroſe which gave occaſion to the further diſcuſſion of the queſ-

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tion of credibility; and it became a doubt whether, where the lands of the teſtator were charged with the payment of debts, two of his attornies, to whom he was indebted for buſineſs done, and the apothecary, to whom he was alſo indebted, were credible witneſſes within the 29 Car. 2; ſuch perſons not having been thought creditors within the meaning of the ſtatutes; but after the court had taken ſome time for deliberation, Lord Mansfield, in an elaborate judgment, delivered the opinion of the court in favour of the credibility. 1 *Bur.* 414. And in the ſame caſe his lordſhip was of opinion, that credibility could be conferred on an intereſted witneſs by payment or releaſe of his claim, as well in reſpect of wills made ſince as thoſe made previous to the ſtatute.

But *note*, as to this *latter* opinion, it is ſaid, that his lordſhip previouſly declared, that it was *perſonally* his own; and that if wrong, he alone was anſwerable for its errors.

And in Hindſon v. Herſey, reported 4 *Burn Eccl. Law*, 93, it was held by *Clive*, *Bathurſt*, and *Gould*, againſt *Pratt*, C. J. that a witneſs, though incompetent at the time of atteſtation by reaſon of intereſtedneſs, might purge himſelf by releaſe or payment of his claim.

We perceive, therefore, that the matter of credibility ſtill remains unſettled, when it refers to the eſtabliſhment of a will: *Lee*, *Camden*, and ſome of the puiſne judges, being of opinion that the credibility muſt exiſt at the time of *atteſtation*, and cannot afterwards be ſupplied, (and of the ſame opinion appears to have been *Thurlow*, Ch. ſee 2 *F. Vez.* 636,) and *Mansfield*, and other of the puiſne judges, thinking that credibility at the time of *proving* their atteſtation is ſufficient.

But there is no doubt that a legatee may be a witneſs *againſt* a will; for the reaſon of his excluſion in the *eſtabliſhment* of a will being the temptation he has to forſwear himſelf, he cannot be ſuſpected of that when his evidence goes in derogation of ſuch intereſt. See *Salk.* 691.

And ſo if it be indifferent to the witneſſes whether the will be eſtabliſhed or not, they are admiſſible, though they be legatees, &c. 1 *Bur.* 427.

Criminal witneſſes.

2. Incredibility on account of crimes. On this head it is to be remarked, that any one who has been guilty of an offence of ſuch a nature as to furniſh a fair preſumption that he is callous to a due ſenſe of the moral obligations of an oath or of juſtice, is conſidered as unworthy of credit in his teſtimony, and conſequently an in-

competent witneſs to the execution of a will, or to the ſanity of the teſtator; ſuch a witneſs being eaſily capable of accommodating his teſtimony to the wiſhes of any perſon whoſe intereſt it might be to invalidate the will. Amongſt offences of the above deſcription are reckoned all thoſe which are denominated *crimes*, or in other words, offences which are not merely *prohibited* by the *legiſlature*, but *infamous* and *criminal* in *their very nature* and eſſence. Theſe are principally the different ſpecies of *treaſon*, *felony*, *larceny*, *præmunire*, and *perjury*, all of which, and more particularly the laſt, render the malefactor incapable of any confidence or credit.

## CHAP. II.

### OF A TESTAMENT AS DISTINGUISHED FROM A WILL OR DEVISE.

IT has been obſerved in the preceding chapter, that there is a material difference in reſpect to the formalities requiſite in deviſing eſtates of inheritance, and in bequeathing property merely perſonal. The firſt of which we have ſeen is required to be in writing, to be ſigned by the teſtator, and to be atteſted by three witneſſes; but it is to be obſerved, that this ſtatute, not extending to goods and chattels, none of theſe requiſites are meterial in a diſpoſition of things coming under that deſcription. Theſe are, 1. Things merely *perſonal*, which compriſe every thing that is *moveable*, or which may be annexed to or attendant on the perſon of the owner; as cattle and other animals, money, jewels, books, houſehold-ſtuff, cloaths, corn, and whatever elſe may be transferred from one place to another. 2. Chattles *real*, compriſing ſuch eſtates, as though not freehold, partake of the realty, as terms for years, eſtates by ſtatute ſtaple, by elegit, and the like; but ſee *ante*, p. 17.

Written teſtaments.

Teſtaments may be either written or verbal, in which latter caſe they are termed nuncupative. As to written teſtaments, if in the hand-writing of the teſtator, they require neither ſigning, nor ſealing, nor witneſſes, ſo that

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ſufficient proof can be had of its being the teſtator's own writing. *Gilb. Rep.* 260.

And though it be neither in the hand-writing of the teſtator, nor ſigned by him, yet if it were written by his inſtructions, and afterwards have his approbation, it will nevertheleſs be a good teſtament of perſonal property. *Com.* 452.

We muſt obſerve, however, that it is by much the more ſafe and prudent way to have it properly ſigned, ſealed, and publiſhed by the teſtator, in the preſence of at leaſt two witneſſes, as it will be leſs liable to diſpute and litigation, and leaves leſs in the breaſt of the eccleſiaſtical judge.

Nuncupative, or verbal teſtaments.

Nuncupative teſtaments are from their nature ſo liable to impoſition, and were formerly found to be the occaſion of ſo many perjuries, that the legiſlature very properly adverted to them in the ſtatute of frauds, we have ſo often ſpoken of, and laid them under a variety of reſtrictions. By that ſtatute, c. 3. it is enacted,

1. That no nuncupative will ſhall in any wiſe be good, where the eſtate bequeathed exceeds £30, *unleſs* proved by three witneſſes, who were preſent at the making thereof, *and unleſs* they or ſome of them were particularly required by the teſtator himſelf to bear witneſs thereto, *and unleſs* it was made in his laſt ſickneſs, in his own habitation or dwelling-houſe, or where he had been previouſly reſident ten days at the leaſt, (except he be ſurprized with ſickneſs in a journey, or from home, and die without ever returning to his own habitation.) And,

2. That no nuncupative will ſhall be ſuffered to be proved or eſtabliſhed by the witneſſes after any longer period than ſix months from the making, unleſs ſuch teſtimony, or the ſubſtance thereof, be reduced to writing within ſix days after it be publiſhed.

3. That no nuncupative will ſhall be proved till fourteen days after the teſtator's death, nor then till proceſs has firſt iſſued to call in the widow or next of kin, to conteſt the ſame if they think proper.

4. That no written will ſhall be revoked or altered by any ſubſequent nuncupative one, except the ſame be in the life-time of the teſtator reduced to writing, and by him read over and approved, and unleſs the ſame be proved to have been ſo done by three witneſſes at the leaſt; which witneſſes muſt by the ſtatute of 4 and 5 Anne, c. 16. be ſuch as are admiſſible in trials at law.

It is provided, however, that the ſaid act ſhall not extend to any ſoldier in actual ſervice, nor to any mariner at ſea; who may diſpoſe of their moveables, wages, and perſonal eſtate, as before the making of the ſtatute. CODICILS.

Thus hath the legiſlature, Sir William Blackſtone obſerves, (2 *Com.* 500.) provided againſt any frauds in ſetting up nuncupative wills, by ſo numerous a train of requiſites, that the thing itſelf has fallen into diſuſe, and is hardly ever heard of but in the only inſtances where favour ought to be ſhewn, viz. when the teſtator is ſurprized by ſudden and violent ſickneſs.

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## CHAP. III.

## OF A CODICIL TO A WILL OR TESTAMENT.

A CODICIL may be defined to be a ſupplement to a will, annexed to and to be taken as part of it, and uſed to explain or alter ſome diſpoſition therein. *Godolp.* § 1. Codicil.

The law relating to codicils agrees in general with that which relates to wills and tenements; like thoſe it may be either written or verbal; and where it is uſed for the purpoſe of deviſing *real eſtates*, it requires the ſame ceremonies to attend its execution as an original *deviſe*; and the ſame latitude is admitted in its form and publication, when its object is the diſpoſition of *perſonal property* only, as is allowed in an original *teſtament*. See 3 *Vez. jun.* 327. In ſome reſpects, however, they differ; for though a man can regularly make but one will or teſtament, he may make codicils without number, and unleſs contradictory to one another, they will all ſtand. *Swinb.* 15.

And a man cannot in the firſt inſtance, it is ſaid, appoint an executor by codicil, yet he may by codicil ſubſtitute another in the room of one originally appointed by the will. *Ibid.* 14.

Alſo where a teſtator leaves two wills, and it is uncertain for want of dates, which was laſt made, they will both be void; but if the like happen with reſpect of two codicils, and the ſame thing is given by one codicil

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to one man, and by another codicil to another, they ſhall divide the thing between them. *Swinb. Ibid.*

And further, where there are two wills of different dates, the firſt is void; but a former codicil will be void only ſo far as it is contradicted by the latter. *Ibid.* and ſee 3 *Bro. Ch. Ca.* 517.

So again where two legacies are given to the ſame perſon, one in the former and the other in the latter part of the ſame will, the legatee ſhall only take one of them. 1 *Bro. Cha. Ca.* 30. and *poſt.* "*Legacies.*" Whereas, if they be given him by two codicils; or by a will and a codicil, they will both be effectual. *Ibid.* 389. 1 *F. Vez.* 472. And the reaſon of this diſtinction is founded on the principle of a codicil's being a *ſupplement* to the will; the eſſential nature of which is (unleſs the contrary appears to be the teſtator's intent, ſee 1 *F. Vez.* 407, 497) to add to what has gone before. But yet where a ſecond codicil is *merely a repetition* of a former will, with the addition of a ſingle legacy, or the like, the former legacies are not doubled, ſuch not being preſumable to have been the teſtator's intention. 2 *Bro. Ch. Ca.* 251. 1 *F. Vez.* 464. and ſee 3 *Anſtr.* 727.

Theſe are the moſt material diſtinctions between a will and a codicil; ſuch others as may exiſt will be found in thoſe parts of our work to which they more particularly relate; their effect in republiſhing a will, is conſidered poſt. tit. *Republication.* Their effect in revoking a will is mentioned in the nex chapter.

## CHAP. IV.

### OF THE MEANS BY WHICH A WILL OR TESTAMENT MAY BE REVOKED OR ANNULLED.

Revocation *expreſs* and *implied.*

A WILL or teſtament may be revoked or annulled, either by ſome poſitive act of the teſtator, unequivocally ſhewing it to be his intention that his will ſhall no longer ſtand, which is an *expreſs* revocation; or by ſome act of a doubtful and equivocal import, furniſhing only grounds to preſume that the teſtator had ſuch inten-

tion, which is an *implied* revocation, or a revocation *in law*.

*Expreſs* revocation.

Expreſs revocations might formerly have been effected by a verbal declaration to that purpoſe. But now, by the aforeſaid ſtatute of frauds and perjuries, 29 Car. 2. c. 3. ſ. 6. It is enacted, "that no deviſe in writing of *lands*, "tenements, or hereditaments, or any clauſe thereof, "ſhall be revocable otherwiſe than by ſome *other will* or "*codicil* in *writing*, or ſome *other writing* declaring the "ſame; or by burning, cancelling, tearing, or obliter-"ating the ſame by the teſtator himſelf, or by ſome per-"ſon in his preſence, and by his directions and conſent. "But that all deviſes and bequeſts of lands and tenements "ſhall remain and continue in force until the ſame ſhall "be ſo cancelled, &c. or be altered by ſome other "will or codicil in writing, or other writing of the "teſtator, *ſigned in the preſence of three or more witneſſes*, de-"claring the ſame; any law or uſage to the contrary "notwithſtanding."

Obſervations on ſtat. 29 Car. II. c. 3 ſ. 6.

It is material to remark, what has probably occurred to the reader, that the *deviſing* clauſe, in the ſtatute of frauds, (ſee *ante*, p. 15.) requires the deviſe to be ſubſcribed by the witneſſes *in the teſtator's preſence*, but does not require that all the witneſſes themſelves ſhould be preſent together at the time of ſuch ſigning; but the *revoking* clauſe here ſtated requires that the inſtrument of revocation ſhould be ſigned *in the preſence of* three or more witneſſes. On this difference in the wording of the two clauſes, a diſtinction appears to have been taken, between a will *revoking merely*, and a will *deviſing and revoking;* upon which it has been held, that where a revoking will *deviſes alſo*, and ſuch will is void under the *deviſing* clauſe of the ſtatute, it will not take effect as a *revoking* will, though it be properly executed according to the forms preſcribed by the *revoking* clauſe; and if this diſtinction were rejected, there would be a repugnancy in the clauſe, for it firſt declares that a will may be revoked by another will, codicil, or writing, (which has been conſtrued to intend a will duly executed according to the *deviſing* clauſe, *i. e.* ſubſcribed by three witneſſes in the teſtator's preſence) and afterwards declares the revocation to be bad, (for the *altering* muſt be underſtood to mean *merely* by revocation) unleſs *ſigned by the teſtator in the preſence of three witneſſes*. If therefore a man would alter his will by ſimply revoking it, he may do it by any writing executed according to the latter part of the

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revoking clauſe; but if he would alter it by revocation and diſpoſition too, he can only do it by a will, executed conformably to the deviſing clauſe. See *Pow. Dev.* 647. alſo 1 *F. Vez.* 11. and 17. in *note*, where the diſtinction here adverted to is largely conſidered.

And it is to be obſerved, that the ſtatute affects only that ſpecies of revocation we are now ſpeaking of, namely, *expreſs* revocations; the law relating to implied revocations remaining the ſame as before the ſtatute.

On the firſt part of this ſtatute, relative to a revocation by ſome *other* will, &c. it has been determined that ſuch other will muſt in all reſpects be a good and valid will, or it will not amount to revocation of the former will. 1 *Eq. Ca. Abr.* 409. 1 *Show.* 89. 2 *Atk.* 272. 1 *Peere Wil.* 343. *Sed vid. cont.* 3 *Mod.* 218.

On the ſecond mode of revocation mentioned by the ſtatute, *viz.* burning, cancelling, &c. it has been held that theſe muſt be done, *with an intent to burn, &c.* to effect a revocation; for if done by miſtake, it is no revocation. *Cow.* 52. 1 *Peere Wil.* 346. 3 *Wilſ.* 508.

And upon the principle that the revocation of a will depends upon the intention of the party, it has been held that the ſlighteſt tearing or obliterating is ſufficient to revoke, when joined with a declared intent of annulling the deviſe. 2 *Black. Rep.* 1043.

And ſo if a teſtator have two parts of his will, and cancel one of them, it will be a cancelling of both, and a complete revocation. 1 *Peere Wil.* 346. 2 *Vern.* 742. *Prec. Chan.* 460.

And where it appears to have been the teſtator's intention to revoke his will, it may be done by an act which is void in law, as by a feoffment without livery, &c. 3 *Atk.* 72.

But yet where a revoking clauſe was indorſed on the teſtator's will, by his direction, and ſigned by four witneſſes in his preſence, but not ſigned by the teſtator himſelf, it was held not to be a revocation within the ſtatute. 3 *Lev.* 86.—It is obſervable, however, that *North* C. J. and *Levitz*, thought that, the teſtator's name being to the *will*, and as there was no intimation of fraud, it was ſufficient.

A will may alſo be revoked in *part* only, by a partial obliteration of particular bequeſts, whilſt the reſt of the will remains, as in *Cow.* 812.—This mode of revoking

bequeſts, it muſt however be obſerved, is very improper and unſafe.

We now proceed to *implied* revocations, or revocations *in law*; and for the ſake of perſpicuity it may be proper to divide this head into,

*Implied* revocation.

1. Revocations effected by the teſtator himſelf in *writing*.

2. Acts in *pais*, amounting to a revocation by conſtruction of *law*; which may be *firſt* by a change in the ſituation of the teſtator; *ſecondly*, by an alteration of his eſtate, *actually* made; and *thirdly*, by ſuch an alteration only meditated and intended.

1. Implied revocations effected by the teſtator in writing; are where a man, having made a will, afterwards makes another *inconſiſtent* with it, without expreſsly revoking the former, the fact of making a new will, furniſhing a neceſſary inference, that the teſtator had mentally revoked the old one. 3 *Wilſ.* 511.

1. Implied revocations in *writing*.

And ſo if, having deviſed his eſtate to two perſons, a teſtator afterwards deviſe it to one of them only; the latter deviſee ſhall have it. 3 *Mod.* 206.

But the bare circumſtance of a ſecond will's exiſting is not of *itſelf* a revocation of the firſt; for, as we have before ſeen, a man may make ſeveral wills of different parts of his eſtate, and all of them be good; it is only, therefore, where the one is contradictory and repugnant to the other, that the latter deviſe will operate as a revocation of the former. 1 *Show.* 537. 3 *Mod.* 203. 2 *Salk.* 592. *Show. Par. Ca.* 146. 3 *Wilſ.* 497.

But though a ſecond will be made, which is inconſiſtent with the firſt, yet it is not an *abſolute* and *immediate* revocation; for though by making a ſecond will it is clear the teſtator *intended at the time* to revoke the firſt, yet as wills are incomplete and revocable till the death of the teſtator, he may before that period change his intention; and if he do, and cancel the ſecond will, the firſt will remain intire as if no other had been made. 4 *Bur.* 2512. Unleſs indeed the ſubſequent will *expreſsly and in terms revoke* the former, in which caſe the better opinion ſeems to be, that the former will does not revive on the ſecond being cancelled. *Doug.* 40. *Cow.* 49.

So likewiſe where the teſtator, having made a new will, *actually* cancelled the old one, and afterwards cancelled the new will, it was held that the old will was not revived,

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though there remained a counterpart of the first will in the testator's possession undefaced; for the revocation being, in both these cases, an express and independent act, rendered the former will absolutely void, and left no room for construction. *Ibid.*

A *codicil* also will be a revocation of the will, if it be inconsistent with it. 3 *Atk.* 552. 1 *Ves.* 32. But as a codicil is considered as a part of the will, and takes effect together with it, it is not *in its own nature* a revocation of the will, but operates as a revocation, so far only as it is repugnant to the particular dispositions in the will, leaving it in all other respects undisturbed. 1 *Ves.* 178. 186.

2. Implied revocations by acts in *pais*.

2. Revocations may be effected by acts in *pais*, amounting to a revocation in construction of law. This may be *first*, by a material alteration in the situation of the testator; *secondly*, by an *actual*; and *thirdly*, by a *meditated* change in his estate.

Change in the testator's *situation*.

*First*, in respect to a change in the *situation* of the testator; the only circumstances which have as yet been held to be a revocation of his will, have been a subsequent marriage and issue, (*a*) which is considered as effecting so

(*a*) The implication furnished by the marriage and issue of the testator, that he intended to revoke the previous disposition made of his property, being founded on the liberal presumption, that having contracted a new relation, he means to perform the duties, and (in the language of Dr. Hay) "as new objects of care arise, extend to them that protective kindness which is morally and naturally due to them," and being liable (as an *equitable* construction) to be encountered by every circumstance indicative of a different intention, Mr. *Fonblanque* has very laudably exerted his known learning and ingenuity to induce the courts to extend this benign and beneficial conclusion in favour of *marriage alone*, for which "there requires no stretch of rational conjecture; the honour, integrity, and affection of the husband may be presumed upon, and upon that presumption the moral claims of the wife may be satisfied; and no *precedent*, he observes, has expressly contradicted this conclusion. See 2 *Treat. Eq.* 355, n. (b) where the propriety of extending it to the single circumstance of the birth of a child after the execution of the will, is likewise con-

total a change in the ſituation of the teſtator, as inevitably to have produced a change in his mind relative to the diſpoſal of his property, the law not ſuppoſing that a man would contract a new relation without meaning to diſcharge the duties which attach to it. *Bur.* 2171. *Ibid.* 2182. *Doug.* 35. *Amb.* 487. 557. 721. 5 *Term Rep.* 57.

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And it has been held to be immaterial whether the child be born before or after the teſtator's death. *Doug.* 31. 5 *T. R.* 49.

But theſe concluſions being upon an equitable conſtruction, ariſing out of the particular circumſtances of each caſe, may, like every other preſumption, be rebutted by collateral circumſtances; as where the will made previous to the teſtator's marriage is conformable to the principle of juſtice, and provided only for ſuch parties as he was bound to take care of. 1 *Eq. Ca. Ab.* 413. *Doug.* 31. 38. and ſee 2 *Brow. Ch. Ca.* 54. *Ibid.* 220.

And it is obſervable that in all the caſes which have occurred under this head, the teſtator diſpoſed of his *whole* eſtate; in which caſe the preſumption in favour of the wife and children is exceedingly ſtrong: but it by no means follows, that where a man diſpoſes of *a part only* of his property, the ſame concluſion is to be drawn; for many reaſons may occur to induce a man to withhold a part of his property from his family, and diſpoſe of it elſewhere. See *Doug.* 31. 38.

As to the will of a *woman*, made previous to marriage, though it is certainly ſuſpended during coverture, it ſeems doubtful whether marriage will amount to a revocation. See 4 *Co.* 61. 1 *And.* 181.—If however, the huſband die leaving the wife ſurviving, it ſeems that her will revives, and on her death will take effect as if no marriage had intervened. *Plow.* 343. But ſee 2 *Bro. Ch. Ca.* 534.

But though a change in a man's ſituation, as to connections, is a preſumed revocation of his will, yet it has been held that a mental incapacity does not operate as a revocation, nor does it ſeem reaſonable that it ſhould; for as revoking is an act of the mind, it cannot be exerciſed by one who has loſt his underſtanding. 4 *Co.* 61. 1 *Vern.* 185.

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tended for, when ſuch after-born child would otherwiſe be inſufficiently provided for.

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Alteration in the teſtator's *eſtate* actually made.

*Secondly*, As to an actual alteration in the *eſtate* of the teſtator.

Upon this ground it has been held, that not only an *abſolute ſale* by the teſtator, of his eſtate, ſubſequent to his deviſing it, will be a complete revocation of the deviſe, 1 *Bro. Cha. Ca.* 401. but where the *legal eſtate only* is transferred, it is a revocation, although the *beneficial* intereſt of the teſtator remains the ſame. 8 *Co.* 90. *Dyer*, 143. 1 *Roll. Ab.* 615. 1 *Atk.* 576. 2 *Atk.* 325. 7 *Brow. Par. Ca.* 177.

And "whenever the eſtate is modified in a different manner from that in which it ſtood at the time of making the will, there is a revocation." Per *Hard. Ch.* 3 *Atk.* 741. *Amb.* 116. 1 *Wilſ.* 308. 3 *Vez. jun.* 664. But where the teſtator retains the ſame eſtate and intereſt exactly, and diſpoſeable of by the ſame means, without any freſh modification, there is no revocation. See 2 *F. Vez.* 599.

And as equitable eſtates are governed by the ſame rules as legal eſtates, the ſame holds as to them, a deviſe of which will be revoked on any new uſes thereof being limited, or any other act done to alter the truſts upon which they are ſettled. *Show. Par. Ca.* 154. 2 *Atk.* 579. 4 *Bur.* 1961. 1 *Eq. Ca. Ab.* 411. 2. *F. Vez.* 598.

And where the whole *fee* is affected by the conveyance, the principle equally applies to the reſulting truſts. 1 *Eq. Ca. Ab.* 412. 3 *Wilſ.* 308. 3 *Atk.* 741.

And ſo it is where the thing of which a diſpoſition is made lies in grant; a will of which will be revoked by a ſubſequent grant, if the fee be affected. 3 *Atk.* 799.

And it makes no difference, it is ſaid, though the conveyance by which the eſtate is altered be made for a *particular purpoſe*, as to prevent dower, to let in an unborn ſon, or the like; provided the whole eſtate be affected. 1 *Roll. Ab.* 616. 3 *Atk.* 749. and ſee 2 *Brow. Cha. Ca.* 319. 3 *Vez. jun.* 664.

And even though the alteration in the ſtatute be made in order to give effect to the diſpoſition made by the deviſe, ſtill it will operate as a revocation of the will. 3 *Lev.* 108. 3 *P. Wms.* 163. 3 *Atk.* 749.

As where a man covenanted to levy a fine, which ſhould enure to the uſe of perſons to be named in his will; and after making his will levied a fine in puſuance of his covenant; it was held to be a revocation of the will; and

ſo of like caſes. See 1 *Roll. Ab.* 614. *Salk.* 341. 3 *Peere Wil.* 170. 3 *Atk.* 803. 1 *Brow. Chan. Ca.* 319. 2 *F. Vez.* 430. 599. 601.

The principle on which the above caſes proceed, is the preſervation of the eſtate to the heir, which the law in all caſes ſhews an anxious ſolicitude to effect; it therefore requires that the eſtate of the deviſor ſhall continue unaltered from the inception of the will till its conſummation by the teſtator's death: and the rule being eſtabliſhed ſolely for the benefit of the heir, and not with a view of effectuating the intention of the teſtator, the queſtion for conſideration is not whether the deviſor intended to revoke his will, but ſimply, whether he intended to do that act, the legal effect of which is to alter the intereſt which was antecedently in him; the revocation, therefore, in theſe caſes, is purely a conſequence of *law*, uninfluenced by, and independent of, any intention of the teſtator. See 2 *Atk.* 579. 3 *Ib.* 799. where the caſes we have been adducing are particularly adverted to, and the principles and reaſonings upon which they proceed are diſtinctly conſidered and recognized.

Inſtances of a ſimilar nature have occurred reſpecting terms for years, though proceeding on a different principle.

Thus a *ſpecific* deviſe of a *leaſe* for lives is revoked by a ſubſequent renewal; if ſuch renewal be complete at the time of the teſtator's death. 1 *Peere Wil.* 168. 575. 3 *Ibid.* 163. And ſo of leaſes renewable on fines, &c. 2 *Atk.* 593. And though the deviſe be deſcriptive of the thing itſelf, and not the intereſt therein, it will be the ſame. 2 *Vez.* 418. and ſee 3 *Anſtr.* 821.

It ſhould be obſerved, however, that theſe caſes, reſpecting the renewal of leaſes, do not turn on any inability to diſpoſe of a future intereſt acquired in them, but on the words of the wills referring to the *then preſent* intereſt only of the teſtator, which intereſt is deſtroyed by the ſurrender. If therefore the words of the bequeſt refer to the eſtate and intereſt which the teſtator may *have at the time of his death*, the leaſes will paſs notwithſtanding any ſubſequent renewals. See 2 *Atk.* 599. 3 *Ibid.* 177. 199.

It was formerly held, that in all caſes ſimilar to the preceding, the eſtate muſt have been actually and ſubſtantially changed, in order to effect a revocation; but ſince courts of equity have conſidered articles for the ſale, or reſpecting the

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ſettlement of eſtates, when entered into for a valuable conſideration, as an equivalent to an actual conveyance from the time they are agreed to be carried into execution, covenants or agreements likewiſe, (where the party has a right to a ſpecific performance) have been held to operate as a revocation of a will. 2 *Peere Wil.* 329. 624. 2 *F. Vez.* 436, 601.

But where a man has an *equitable* intereſt in fee, and deviſes it, and afterwards, by a legal conveyance, takes the *legal* eſtate to the ſame uſes, this will be no revocation; and though the deviſe were between the articles and the legal conveyance, the latter does not revoke the will, for of whatever kind it may be, it is only *inſtrumental* in changing an equitable into a legal eſtate. Per *Lord Hardwicke.* 1 *Wilſ.* 311. and ſee 2 *F. Vez.* 429.

But his lordſhip obſerved, that it could not be laid down as a rule, equally general, that the turning a legal eſtate into an equitable one, would not be a revocation. *Ibid.*

Nor will a deviſe of land, executed in the interval between the execution of the firſt and laſt of ſeveral inſtruments operating as one conveyance, be revoked by ſuch conveyance, becauſe the whole tranſaction is conſidered as one act, done at the inception of the firſt inſtrument. 1 *Black. Rep.* 251—706. 2 *Bur.* 431. 4 *Ibid.* 1962.

Alſo a partition between tenants in common, is no revocation of a previous will, if the deed be confined to that object merely. 3 *Peere Wms.* 170. And though a fine be levied to accompliſh the partition, it makes no difference. 2 *F. Vez.* 600. But if it be for any other purpoſe than merely the partition, it will operate as a revocation. 1 *Wilſ.* 309. 3 *Atk.* 799. 2 *F. Vez.* 429.

Nor is a conveyance in fee for payment of debts, a revocation. 2 *F. Vez.* 600.

And it has been held that where a copyholder ſurrendered to new uſes, with remainder to himſelf in fee, it was no revocation of his will, his old uſe in fee not being diveſted by the new ſurrender. 2 *Black. Rep.* 1046.

See the ſubject of Revocation elaborately conſidered. 2 *F. Vez.* 429, & ſeq. and 598, & ſeq.

*Intended* alterations in the *eſtate* of the teſtator.

We come *thirdly* to conſider the effect of an alteration, not *actually made*, but only *meditated* and *intended* in the eſtate of the teſtator; and the reader will perceive that the caſes we ſhall here adduce materially differ in their

principle from thoſe of the former deſcription, in as much as caſes of an actual alteration, as we have ſeen, depend intirely and ſubſtantively on the operation of law, without any reference to the revoking *intention* of the party; whereas thoſe of a meditated alteration only, advert invariably to that idea, and operate as a revocation, in proportion only to the ſtrength of preſumption they afford of ſuch intention.

An inſtance of an intended alteration in the teſtator's eſtate, is that of his attempting to diſpoſe of an eſtate by a conveyance, which for want of due formalities, as *livery*, *inrolment*, or the like, fails of taking effect; in which caſe, though the deed be void as to a transfer of the eſtate, it will operate as a revocation of a will previouſly made. 1 *Roll. Abr.* 615. 1 *Black. Rep.* 349. 3 *Atk.* 72. 3 *F. Vez.* 653.

So if a man, after deviſing his eſtate to one, make a freſh will, and deviſe it to the *poor of the pariſh*, or to a *corporation* not within the ſtatute, the latter deviſe, though incapable of taking effect, will notwithſtanding be a revocation of the former, and ſo of ſimilar caſes. 1 *Roll. Abr.* 614. 2 *Eq. Ca. Abr.* 359. 1 *Brow. Par. Ca.* 405. 9 *Mod.* 190. 10 *Ibid.* 237. 3 *Atk.* 72.

But as theſe caſes turn upon the preſumed intention of the teſtator to alter his eſtate, if it can be ſhewn that he in fact had no ſuch intention, there will be no revocation. *Ow.* 76. *Gouldſb.* 32.

The caſes we have at preſent adduced, have been thoſe where the revocation has been produced by the act of the teſtator himſelf; but revocations may in ſome caſes be effected *by the act of a ſtranger*; as if, after deviſing lands, he be diſſeiſed, and his eſtate turned to a right, it will not paſs by the will, becauſe at the time of his death, he was not ſeized thereof. *Ca. Temp. Holt*, 748. But if the deviſor before his death re-enter, it will (according to ſome) purge the diſſeiſin, and re-eſtabliſh the will. Vid. *pro*, *Ibid.* 11 *Co.* 51;—*contra*, *Palm.* 205: *or by operation of law, without any act of the party*; as a deviſe of an annuity was held to be revoked by a ſubſequent ſubſcription by the legiſlature. 2 *Vez.* 419.

As to revocations *pro tanto*.

Having as yet confined ourſelves to ſuch acts as conſtitute an *entire* revocation, uſually denominated a revocation *in toto*; we ſhall now conſider thoſe which effect a *partial* revocation only, which is called a revocation *pro tanto*.

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Of this laſt ſpecies of revocation is a mortgage in fee; for as courts of equity exerciſe an excluſive juriſdiction over the ſubject of mortgages, they conſider the end of the mortgage, which evidently being not to revoke a previous will, but for the particular purpoſe of ſecuring the payment of a ſum of money, is looked upon in thoſe courts as of a mere *perſonal* nature, and therefore held to be a revocation *pro tanto* only, *i. e.* to the amount of the ſum borrowed. But before courts of equity aſſumed this juriſdiction, a mortgage in fee was *at law* held to be a total revocation of a previous will. 1 *Vern.* 329. 2 *Chan. Ca.* 154. 2 *F. Vez.* 417—598. 3 *Ibid.* 654. 685.

And, though the mortgage be made by *fine* alſo, it will make no difference. 2 *Peere Will.* 329.

A mortgage for years is alſo a revocation *pro tanto* only, and that as well at law as in equity: with this difference, however, that at law it is an abſolute revocation as to the *term*, though it does not affect the reverſion; whereas in equity it is partial, as well as to the term as the reverſion. 8 *Vin. Abr.* 156. But in the caſe here referred to it was at the ſame time unanimouſly held, that had the leaſe been to begin *preſently*, or at any time during the teſtator's life, it would have been no revocation, for it might then have determined in the life-time of the teſtator, and would not therefore have been inconſiſtent with the deviſe.

But a diſtinction has been taken in caſes where the mortgage is made to a ſtranger, and where it is made to the deviſee; for though it be only a partial revocation when made to a ſtranger, yet when made to a deviſee it has been held to be a revocation *in toto*, as being inconſiſtent with the deviſe. *Prec. Chan.* 514. And the ſame was held of a leaſe for years made to the deviſee, to commence after the teſtator's death. *Cro. Jac.* 49. But it has been ſaid, however, that if, in a mortgage for a term of years, a fine *ſur connuzance de droit come ceo*, be levied, it will effect a total revocation; *per Cowper*, ſee 8. *Vin. Abr.* 136.—*ſed* quære.

Upon the principle we before adverted to, of the mortgage being intended as a *ſecurity* merely, and therefore conſidered in equity as of a perſonal nature, it has been held that where the whole eſtate deviſed by a previous will had been conveyed in fee, in truſt to ſell for the payment of a debt, the conveyance was a revocation of the deviſe only to the extent of letting in the incumbrancer. See 2 *Atk.* 148. 272; and ſee a confirmation of

the ſame doctrine, *Prec. Chan.* 32. 2 *Vern.* 241. 1 *Eq. Ca. Abr.* 410. 2 *Ibid.* 176. 3 *Peere Wil.* 244. REPUBLICATION.

A leaſe for years, or life, is likewiſe a revocation of a will *pro tanto.* 3 *Vez. jun.* 653.

Alſo if a teſtator vary his will, as to part only of his eſtate, and leave the reſt unaltered, this will be a revocation only as to the part of the will ſo varied. 1 *Roll. Ab.* 616.

And ſo if a teſtator deviſe to one an eſtate in fee, and afterwards alter the deviſe to an eſtate in tail, it will be a revocation only to that extent. *Per Lord Mansfield, Cow.* 92.

## CHAP. V.

### CONCERNING THE MEANS BY WHICH A VOID WILL MAY BE RENEWED OR ESTABLISHED BY REPUBLICATION.

AS in treating of revocations we began with obſerving upon the ſtatute of frauds, as far as it affected that ſubject, and then proceeded to revocations at the common law; we ſhall here purſue the ſame courſe, and conſider, firſt, what formalities are required for the republication of a will under that ſtatute; ſecondly, what will amount to a republication in other caſes; and thirdly, the effect of a republication on the contents of the will.

1. And as to the formalities required for the republication of lands, it has been held that as the revoking clauſe in the ſtatute of frauds put an end to parol revocations, (which ſubſiſted at common law) ſo the deviſing clauſe in that ſtatute equally put an end to parol republications; for as the effect of a republication is to deviſe, and the ſtatute ſays that all "deviſes" of lands and tenements ſhall be in writing, &c. it muſt be conſtrued to extend to republications; the ſame ceremonies therefore which we have ſeen to be neceſſary in executing an original will, muſt be obſerved in the act of republiſhing it. 1 *Vez.* 440. 9 *Mod.* 78. 1. Republication under 29 Car. 2.

Unleſs in caſes of *conſtructive* republications, which, like conſtructive revocations, are not within the purview of the ſtatute; for theſe being inferences of law ariſing from facts, which are capable of being proved without

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the aid of parol evidence, they are not within the miſchief the ſtatute was made to prevent.

Thus where the teſtator having made a ſecond will, which was repugnant to, and conſequently a revocation of the firſt; afterwards deſtroyed the latter, and left the former uncancelled, this was held to amount to a republication of the firſt will. 2 *Atk.* 593, of which ſee more *ante* Chap. IV.

And a republication made agreeably to the requiſitions of the ſtatute, is held to ſupply any defect in the ability of the teſtator to deviſe at the time of making his will.

Thus where a perſon made a will of land during his minority, it was held that a re-execution of it after he came of age, was a confirmation of the will, and rendered it as valid as if originally made at that time. 1 *Sid.* 162. 1 *Keb.* 589. and ſee *poſt.*

2. Republication at common law.

2. Before the ſtatute of 29 Car. 2. the ſlighteſt circumſtances ſhewing the intention of the teſtator to confirm his will, was a ſufficient republication; and as that ſtatute affects only eſtates of *inheritance*, the ſame rule ſtill applies to diſpoſitions of every other ſpecies of property, whether real or perſonal. See 1 *F. Vez.* 497.

So that if a perſon having deviſed all his lands to another, afterwards purchaſes a *copyhold eſtate*, (which is not within the ſtatute) and *re-deliver* his will, it will be a ſufficient republication to paſs ſuch after-purchaſed lands. 1 *Roll. Ab.* 618.

And if, in the above caſe, inſtead of *re-delivering* his will, he merely ſays to a ſtranger, that ſuch lands ſhall go to the deviſee of his other lands, it will amount to a republication. *Cro. Eliz.* 493. *Moor*, 404. 2 *Chan. Rep.* 72. 2 *Vern.* 209. 1 *F. Vez.* 497.

Alſo where a teſtator made uſe of theſe words, "My will in the hands of *I. S.* ſhall ſtand," it was adjudged to be a good republication. 2 *Show.* 48.

In ſhort, any act or words of the teſtator, ſufficient to authorize a fair preſumption that he deſired his will ſhould remain, was at the common law, and therefore ſtill is, in reſpect of property not within the ſtatute of frauds, a good republication. See 1 *F. Vez.* 497.

As to codicils republiſhing wills.

Queſtions have ariſen, as to how far codicils are in themſelves a republication of a will; and alſo how far codicils diſpoſing of *perſonal* property only will affect a republication of a will of *lands*; upon which points the following are the principal caſes that have occurred.

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A teſtator, after making a new purchaſe of lands, had his will read to him, to which he ſaid nothing, but made a codicil, bequeathing ſome goods and legacies, which was annexed to his will; and the queſtion was, whether the codicil amounted to a republication of the will, ſo as to paſs the lands previouſly purchaſed; and it was held that it was, for by annexing the codicil the teſtator manifeſted an intent that his will ſhould ſtand. 1 *Eq. Ca. Ab.* 406. and ſee 2 *Bro. Cha. Ca.* 291. 511. 4 *Ibid.* 2. 1 *F. Vez.* 486.

And ſo where a leaſe deviſed by will was afterwards renewed by changing a life, a codicil afterwards made, and annexed to the will, was held to operate as a republication. 1 *Peere Wil.* 168. 2 *Vern.* 209.

And though the codicil be not *annexed* to the will, yet if by relating to the ſubject matter of the will, it appears that the teſtator conſidered the will to be valid, it will be a republication. *Com. Rep.* 381. 1 *Vez.* 437. 443. 3 *Peere Wil.* 329. *Cowp.* 158. *Amb.* 571. But in all theſe caſes it is to be underſtood, that the codicil was executed purſuant to the ſtatute.

Upon theſe authorities, therefore, (though, it muſt be confeſſed, that there are ſome others, of a contrary tendency, though of too little weight, in our opinion, to deſerve attention) it ſhould ſeem that every codicil, whether affixed to the will or not, and though it relate only to perſonal property, will, if *executed according to the ſtatute of frauds*, be a republication, and eſtabliſh a deviſe, of *lands*; and that, though not executed according to the ſtatute, will confirm a will of *perſonal* property.

A codicil may alſo republiſh a will, as to a part only of lands deviſed; its operation, when conſidered as a republication, being, as we ſhall ſee hereafter, to give effect to the words of the will, ſo far as they are applicable to the property of the teſtator at the time of ſuch republication. 2 *Peere Wil.* 329.

But it is to be obſerved that a codicil, in republiſhing a will, does not give it any quality of validity which it had not before; therefore a will not properly executed will not be helped by a codicil, though the codicil be executed according to the ſtatute. 2 *Vern.* 597;—except in caſes where the will and codicil make together but *one inſtrument*.

3. The effect of a republication upon the ſubject of the will.

3. We ſhall now make ſome obſervation upon the effect of a republication on the diſpoſitions in the will.

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The effect of a republication upon a will, is to give the words uſed therein the ſame operation as they would have had if the will had been made *at the time of republication*, and conſequently to extend its operation to all property puchaſed ſubſequent to the will that is conveyed by ſuch words. *Pow. Dev.* 683.

In queſtions of republication, therefore, the point to be conſidered is, not what the teſtator had in contemplation, *at the time of making his will*, but to what the words of the will extend, *at the time of republication*. On this principle it was held, that where a teſtator deviſed all his lands in *A.* and then purchaſed more lands in *A.* by republiſhing his will, the new-purchaſed lands paſſed together with the others. *Gouldſb.* 150. *Cro. Eliz.* 493; the effect being the ſame, as if the teſtator had made a new will, in which caſe "all his lands in *A*," would have been a ſufficient deſcription.

And ſo if a teſtator deviſe, by the words "all his real eſtate," by a republication any after-purchaſed lands will paſs. 1 *Vez.* 442. *Ca. Temp. Holt.* 252. 748.

But where in his will he deviſed certain real eſtates, and by a codicil confirming his ſaid will, deviſed the *ſaid* eſtates to truſtees, &c. this republication was held not to paſs eſtates purchaſed between the time of his making his will and his codicil, for the preſumption, that the teſtator intended to paſs the latter eſtates, was rebutted by his expreſsly referring to the former eſtates. 7 *Term Rep.* 482.

Agreeably to the above rule it has been held, that a perſon not in exiſtence at the time of making the will, may be rendered capable of taking by republication, provided the deſcription in the will be ſufficiently apt to denote him; as where a father bequeathed a ſum of money, chargeable on a real eſtate, to his ſon *Joſeph*, who died; but afterwards, having another ſon of the ſame name, he by a codicil confirmed his will, and gave an additional portion to his ſaid ſon Joſeph; it was held, that the republication amounted to a ſubſtitution of the ſecond ſon Joſeph in the place of the firſt. 5 *Co.* 68. 1 *Peere Wil.* 275.

But the rule is not to be extended farther than the foregoing principle will ſtrictly warrant, namely, to give the words in a will the ſame effect as if firſt written at the time of republication.

Therefore though the word "ſon" in a will, is applicable to a grand-ſon as well as a ſon, where there is no

ſon in being; yet where a teſtator, by particularly noticing his grand-ſon, ſhewed he meant to uſe the word in its proper ſenſe, a republication of his will was held not to be a ſubſtitution of him in the room of a deceaſed ſon. 2 *Show.* 63. 3 *Mod.* 318. 2 *Vern.* 106. *and ſee Ibid.* 722. *Prec. Chan.* 439. RECAPITULATION.

## CHAP. VI.

### A SUMMARY, *or familiar* RECAPITULATION *of the* FORMER HEADS, *deſigned for the Uſe of* UNPROFESSIONAL READERS.

Preliminary obſervations.

WE have at length gone through the ſeveral heads we propoſed to conſider relative to the Law of *Wills*, *Teſtaments*, and *Codicils*; in which, by explaining the reaſons and principles upon which the caſes to which we had occaſion to refer were adjudged, we endeavoured to render ourſelves both intelligible to the uninformed reader, and inſtructive to the younger part of the profeſſion—but as, in diſcuſſing many of the points which neceſſarily came under our conſideration, particularly the ſtatutes of *wills*, and of *frauds* and *perjuries*, we unavoidably recurred to notions and expreſſions more refined and technical than we fear will be readily comprehended by thoſe who are unaccuſtomed to the inveſtigation of legal topics (but for whoſe uſe, nevertheleſs, the preſent ſheets are chiefly deſigned) we ſhall here recapitulate, in a familiar detail, ſuch practical formalities and requiſites as are material to be remembered and attended to by thoſe whoſe particular inclinations, or whoſe peculiar ſituation in reſpect to remote reſidence, or ſudden indiſpoſition, may induce or oblige them to frame their own wills, or other teſtamentary inſtrument.

The proper age of a teſtator.

1. The firſt thing to be conſidered by a perſon who is about to make a teſtamentary inſtrument, (whether ſuch inſtrument be intended to diſpoſe of his property by a *will*, in the firſt inſtance, or to add to, detract from, or otherwiſe alter; or to *revoke*, or *confirm* a will formerly made) is whether he has arrived at the age at which he is deemed by law capable of exerciſing a ſerious judgment in reſpect of the diſpoſal of his property.

This age, if the property to be diſpoſed of conſiſt of

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*landed poſſeſſions*, or other eſtates or intereſts, held in fee-ſimple (that is to ſay, held by the teſtator to himſelf and his heirs without condition or reſtriction) or held by him during the life of another, is 21 *years*, both in reſpect of men and women; and in reckoning ſuch age the day of the teſtator's birth need not be reckoned, ſee *ante* p. 4. 9. 17.

But if the property intended to be diſpoſed of conſiſt of eſtates held for a certain term of years only, of money, whether in hand, in the funds, on mortgage, or otherwiſe, or of houſehold goods, plate, linen, or other things, which by common poſſibility may be moved from place to place, and made to accompany the perſon of the poſſeſſor, (for which reaſon theſe kinds of things are denominnated *perſonal property*) the age at which the owner is allowed by law to diſpoſe thereof by will, is *fourteen* in males, and *twelve* in females (*ante* p. 4. 25.)

Teſtator's freedom of will.

2. The ſecond thing to be aſcertained is, that the perſon is ſo ſituated, in reſpect of circumſtances of diſcretion, as to be deemed in law capable of exerciſing a freedom of will, and a rational judgment. The circumſtances inducing a belief in the eye of the law that a perſon is incapable of diſpoſing of his property upon the ground of indiſcretion, are, 1. The being an *idiot*, *childiſh*, or *inſane*, which, though the perſons of this deſcription are generally inſenſible of their deficiency, it is proper to mention for the information of thoſe who are entitled to their effects upon their deceaſe, (*ante* p. 5.) 2. The being a *married woman*, unleſs indeed the huſband be abroad from ſentence of baniſhment for life, or unleſs on her marriage her huſband covenanted with her relations or friends, to permit her to diſpoſe of certain property by a will, (*ante* p. 5.) 3. The being under ſuch reſtraint by reaſon of threats, or other circumſtances of intimidation, as to be induced to make a diſpoſition contrary to his wiſhes, (*ante* p. 7.) Having been convicted of *treaſon* or *felony*, which offences render the delinquent incapable of diſpoſing by will, of any ſpecies of property whatever, or the being *outlawed*, which incapacitates him from diſpoſing of his *perſonal property* only. (*ante* p. 7.) 5. The being a foreigner born. This circumſtance, however, induces an incapacity in regard to freehold property only, and not to that of a perſonal nature, (*ante* p. 8.)

Property which may be diſpoſed of by will.

3. The third thing to be conſidered is, whether the property intended to be deviſed or bequeathed, is of ſuch a nature as, conſiſtently with the rules of law, is capable

of being the ſubject of a teſtamentary diſpoſition. As to which it may be remembered, that every ſpecies of property is capable of being diſpoſed of by will, except, 1. Eſtates of freehold not in actual poſſeſſion of the party at the time of making his will. 2. Eſtates turned to a right. 3. Titles of dignity. 4. Offices and corrodies. 5. Franchiſes of ſuch a nature that no certain value can be affixed to them. 6. Property belonging to colleges, hoſpitals, and other aggregate corporations. 7. Goods, &c. belonging to the church. 8. Copyhold premiſes, not previouſly ſurrendered to the uſe of the owner's will, (of which things ſee *ante* p. 12.) RECAPITULATION.

4. The fourth thing to be conſidered is, whether the object of the teſtator's benevolence is capable of taking what is intended him; this he will be unleſs he is, 1. An alien or foreigner born. 2. A catholic, refuſing to take the oaths of allegiance and ſupremacy. 3. An illegitimate child, not of ſufficient age to have acquired a name by reputation. 4. A deviſe of land, or of money charged upon, iſſuing from, or to be laid out in land for any charitable uſe, will alſo be invalid, (*ante* p. 14. 15.) Perſons capable of taking by will.

The teſtator having ſatisfied himſelf as to the requiſites to conſtitute a valid deviſe, as far as relates to his own perſon, the perſon of the deviſee, and the thing to be deviſed, he may proceed to frame his will agreeable to the forms delineated in the *Appendix* to the preſent Treatiſe; in doing which it is neceſſary that he ſhould deſcribe and particularize, as well the perſons he intends to benefit, as the property deviſed or bequeathed, in ſuch a plain and explicit manner, that no doubt can poſſibly ariſe after his deceaſe, in reſpect to any part of his intentions.

5. The only remaining thing will be for the teſtator to ſign and publiſh his will in the form preſcribed by law, which is as follows: Signing and publication of will.

If the property deviſed, or any part of it, conſiſt of eſtates of freehold, or of other the eſtates or intereſts deſcribed in ſec. II. the will muſt be ſigned by the teſtator, (or if he be from illneſs or other cauſe unable to write his name, or make his mark) by ſome other perſon in his preſence, and by his direction, in the preſence of three or more credible perſons, and then addreſſing himſelf to ſuch perſons, he muſt uſe the following words, "I publiſh and declare this to be my laſt will and teſtament, and deſire you will witneſs it," or words to the like effect, who

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muſt accordingly ſign their names to the atteſtation of the will, *in the preſence of the teſtator*, or at leaſt in ſuch a ſituation as he may ſee them ſign the ſame, *ante* p. 19. 21.

And it is here material to remark, that the perſons atteſting the execution of a will, muſt be credible and well-diſpoſed perſons, whoſe teſtimony, ſhould they afterwards be called upon, may be worthy the belief of an Engliſh jury. As to which matter it muſt be remembered, that no perſon to whom any legacy is given by the will, can atteſt its execution, for ſuch perſon being ſuppoſed to be too much intereſted in it to be worthy of credit, all legacies given to them are by expreſs act of parliament declared to be void, (*ante* p. 23.) Nor will any perſon convicted of any crime, be a good witneſs, ſuch perſons being likewiſe deemed unworthy of credit, (*ante* p. 24.)

The above regulations are neceſſary to be attended to, we have ſaid, in reſpect to a deviſe of things of a *freehold* nature; but if the property given by will be of a nature merely perſonal, it is not *abſolutely neceſſary* that there ſhould be any witneſſes to the teſtator's ſigning, ſo that the ſignature be in his own hand-writing; but the ſafer and better way is, that it be ſigned in the preſence of at leaſt *two* credible witneſſes, who ſhould atteſt the ſame as before directed, only that it is not material that they ſhould in this caſe ſubſcribe their names in the *preſence of the teſtator*. (See *ante* Chap. II.)

Nuncupative wills.

As to *nuncupative* wills, or thoſe made by word of *mouth* only, ſee *ante*, p. 26, and *poſt. Appendix*.

Alteration of will.

6. It is further to be obſerved in reſpect to the diſpoſition of property by will, that if the teſtator, after having made his will, ſhould wiſh to revoke, add to, or otherwiſe alter any thing contained in it, it is not neceſſary that he ſhould frame it anew; for it will be equally effectual, if he expreſs his intentions, either at the foot of the will, or on a ſeparate paper to be annexed to it. But this ſubſcription, or annexed paper, muſt be ſigned and publiſhed by the teſtator in the ſame manner as if it were a new will; and as often as the teſtator acquires any *freehold* property, ſubſequent to his making his will, he muſt deviſe it in the manner we are ſpeaking of, unleſs he intends it ſhould deſcend to his heir at law, as no freehold lands, &c. acquired ſince the date of the will, will paſs by ſuch will, however comprehenſive the words uſed in it may be, unleſs the will be *republiſhed*, ſee *ante* Chap. V. in which caſe it will paſs to thoſe to whom the reſt of the teſtator's

freehold property may have been deviſed by the will; but if the property acquired ſince the making his will, be not freehold, but of a *perſonal nature* only, it will paſs by a will previouſly made to the legatees named in ſuch will, without any republication or new bequeſt, provided there be words in the will ſufficiently general to comprize the ſame. EXECUTORS, &c.

7. It may perhaps be unneceſſary to conclude with obſerving, that a will, whether of real or perſonal property, may be made void, not only by *tearing* and *cancelling* it, but by any other means of defacing or obliterating it, *ante* p. 30. in doing which no particular form is neceſſary, nor any witneſſes required to be preſent. Vacating a will.

A will may alſo be vacated by another will being afterwards made and duly executed in the manner before ſet forth, as it likewiſe may by ſuch alteration in the ſituation of the teſtator, or of his property, as is mentioned in Chap. IV.

## CHAP. VII.

## OF EXECUTORS AND ADMINISTRATORS.

WE do not recollect to have met with any treatiſe on the ſubject of executors and adminiſtrators, that appeared to us to be ſufficiently perſpicuous. Thoſe who have been led, by the great ſimilarity which ſubſiſts between theſe two offices, to treat of them together, have found it impoſſible to help confuſing the duties of the one with the duties of the other; and thoſe who, to avoid this perplexity, have treated of them ſeparately, have on the other hand been driven into numberleſs and tireſome repetitions: where one method of obviating a difficulty has failed, it ſeems expedient to try another; that which ſuggeſts itſelf as moſt likely to be ſucceſsful, is to ſeparate the reſpective duties of each, ſo far only as they are evidently diſtinct, and to blend them together in thoſe caſes wherein they are one and the ſame. With this view we ſhall conſider, Preliminary obſervations.

EXECUTORS, &c.

I. The office and duty of an *executor*, as distinguished from those of an *administrator*.

II. The office and duty of an *administrator*, as distinguished from those of an *executor*; and,

III. The functions and duties applicable to both.

1. Relative to their general power over the effects of the deceased.

2. Relative to the office of distributing those effects.

## I. *Of the Office and Duty of an Executor, as distinguished from those of an Administrator.*

An executor.

An executor is one who is appointed by the testator, to carry into execution his will and testament after his decease; and, as far as concerns the goods and chattels of the testator, is equal to the *hæres designatus*, or *testamentarius* of the civil law.

Rightful.

Of executors there are two sorts; a *rightful* executor, properly appointed by the will of the testator, and a *wrongful* executor, stiled in law an executor *de son tort*, who takes upon himself the office of executor, by intrusion, and without being constituted by the testator or the ordinary. *Dyer*, 166. 3 *Term Rep.* 58.

Wrongful.

A wrongful executor is in no respect favoured by the law, on account of the great inconvenience that would follow if creditors were permitted to be their own carvers, and strive who should satisfy himself first. He cannot therefore retain the property of the intestate in discharge of his own debt, though of a superior degree. 2 *Term Rep.* 100. And he will be liable to an action, unless he deliver over the intestate's goods to the rightful administrator, *before* a suit be commenced against him. 3 *Ibid.* 590.

But the doing acts of necessity, prudence, or charity, as locking up the goods of the deceased for greater security, feeding or attending his cattle, milking his cows, or even burying the deceased, is not such an intermeddling as will charge a person with the consequences of his being an executor *de son tort*. 2 *Black. Com.* 507. See more particularly what acts of a stranger will so charge him, *Wentw. Exec.* c. 14. 5 *Co.* 33. *Salk.* 313. 2 *Term Rep.* 97.

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He is liable to anſwer to the rightful executors, as alſo to the creditors and legatees of the deceaſed, to the amount of the goods of the teſtator, which he ſhall have improperly adminiſtered. 3 *Term Rep.* 587. 590.

And by ſtatute 43 Eliz. c. 1. the executors and adminiſtrators of an executor in his own wrong ſhall in like manner be liable to pay the debts of the teſtator; he may alſo be ſued for legacies and debts, as a rightful executor may, *Noy* 13; but he cannot on the other hand *maintain* any action, becauſe he has no will to produce as an authority. In equity, however, he will be allowed all ſuch payments as a rightful executor ought to have paid. 2 *Chan. Rep.* 33.

We have taken occaſion to mention here theſe few incidents, attaching upon a *wrongful* executor, becauſe we probably ſhall not have an opportunity of mentioning them elſewhere. We ſhall now proceed to a *rightful* executor, duly appointed by the teſtator.

Appointment of executor.

The appointment of an executor was formerly deemed an eſſential to every will; but though a will is incomplete *without an executor*, it is now held to be effectual to all material purpoſes. 2 *Chan. Rep.* 112. *Raym.* 1282.

The regular way of appointing an executor, is by expreſly naming him as ſuch in the will; but any words, indicating the teſtator's intention that a perſon ſhould be his executor, or in other words, have the execution of his will, will be deemed a ſufficient appointment.

This appointment may be abſolutely or conditionally, generally or ſpecifically, of part or the whole of the teſtator's eſtate, or in any other manner the teſtator chooſes, and if the executorſhip expire before the goods have been completely diſtributed, the ordinary may grant adminiſtration of thoſe remaining. *Wood Inſt.* 320.

Who may be an executor.

We have already ſeen who are by law allowed to make a will or teſtament; and it may be ſaid in general, that whoever is capable of making a will, is capable of being an executor; and ſome, who cannot make a will, may yet be executors, for married women and infants, though incapable of making a will, may be made executors; and in the caſe of an infant, though he be unborn at the time of appointment; but an infant could never act in the execution of his truſt before the age of 17, till which age adminiſtration was granted to ſome other diſcreet perſon, to act for him. *Went. Ex.* 342. And inconvenien-

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cies having ariſen from granting probate to infants, it is now by 38 Geo. 3. c. 89. enacted, that where an infant is ſole executor, adminiſtration, with the will annexed, ſhall be granted to the guardian of ſuch infant, or ſuch other perſon as the ſpiritual court ſhall think fit, until ſuch infant ſhall have attained the age of 21 years, when, and not before, probate of the will ſhall be granted to him.

And ſo an alien may be an executor, though diſabled from making a will. *Ibid.* 15. *Cro. Car.* 9.

Authority, &c. of executor.

An executor receives his authority from the will, and not from the *probate*, he may therefore do many acts in execution of the will before it is proved, as releaſe, pay or receive debts, aſſent to legacies, and demiſe lands. 2 *Black. Rep.* 624. 3 *Term Rep.* 125. He may alſo be ſued, or *commence* an action; but as he muſt produce his letters teſtamentary to the court, he cannot proceed till he has obtained probate. 1 *Salk.* 299. 2 *Vern.* 49. See more particularly what acts an executor may do before probate; *Godolph. Orph.* and *Went. Ex.*

If an executor die before probate, adminiſtration muſt be taken with the will annexed, becauſe no one can prove the will, but he who is named executor. *Dyer*, 372. And if an executor die, his executor will be executor to the firſt teſtator, and there will need no freſh probate. 1 *Leo.* 275; for as the power of an executor is founded on the ſpecial confidence and actual appointment of the deceaſed, he is allowed to tranſmit that power to another, in whom he has an equal confidence.

If one of the executors prove, it is ſufficient. 1 *Salk.* 311. and ſee 2 *Anſtr.* 524, where the court directed an account againſt two executors, though only one of them had proved the will,

If all the executors refuſe to prove the will, they cannot afterwards adminiſter, or in any reſpect act as executors, unleſs indeed adminiſtration were granted to another on their firſt refuſal, for they muſt be twice cited. 1 *Salk.* 308. *Plow.* 281. 9 *Co.* 37. *Cro. Eliz.* 92.

As the executor is conſtituted by the teſtator himſelf, and by him thought fit, the ordinary cannot ſet him aſide for any diſability at the *common law*, as on account of his becoming a bankrupt. *Salk.* 299; but it is otherwiſe of a natural diſability, as inſanity, idiotiſm, &c. 1 *Salk.* 36.

But it is to be obſerved, though bankruptcy does not invalidate the appointment of the executor, the court of

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chancery will appoint a receiver of the teſtator's effects, in order to protect them; as it alſo will upon the application of a creditor, if the executor appears to be waſting the aſſets. 3 *Brow. Cha. Rep.* 365.

So if an executor take out adminiſtration, or be once ſworn, (though he will not afterwards adminiſter,) the ordinary cannot make any other; for it was the teſtator's folly to make ſuch a one executor as will not adminiſter. 1 *Vent.* 335; but if he once adminiſter, he cannot afterwards refuſe, for he has then made his election; and if it were otherwiſe, he might convert the goods to his own uſe, and then refuſe to adminiſter; the ordinary may therefore, in ſuch caſe, iſſue proceſs to compel him to prove. 9 *Co.* 36. 1 *Mod.* 213.

And if an executor refuſe to take upon himſelf the execution of the will, he ſhall loſe any legacy which is bequeathed to him, unleſs it is probable, from nearneſs of kindred, or other circumſtances, that the teſtator would have given the legacy notwithſtanding. For the legacy is *primâ facie* ſuppoſed to be intended as a recompence for the teſtator's trouble. *Ow.* 44.

But he may take time to conſider, and the ordinary may in the mean time grant letters to any diſcreet perſon, to collect in the effects of the deceaſed. *Cro. Eliz.* 92; but ſuch perſon is properly neither executor nor adminiſtrator, his only buſineſs being to keep the goods in his ſafe cuſtody, and do other acts for the benefit of perſons entitled to the deceaſed's property.

If a creditor conſtitutes his debtor his executor, it is at law a releaſe or diſcharge of the debt, whether the executor act or not, provided however, there be aſſets ſufficient to pay the teſtator's debts; for though the diſcharge of the debt ſhall take place of all *legacies*, yet it would be unfair to defraud the teſtator's creditors of their juſt debts by a releaſe, which is abſolutely voluntary. 2 *Black. Com.* 511. But though ſuch appears to be the caſe at law, it ſeems otherwiſe in equity, for there the appointment of a debtor or executor is held to be only a diſcharge of the *action* at law, and not of the *debt*, which he muſt ſtill bring into the aſſets of the deceaſed. See 3 *Brow. Cha. Ca.* 110.

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## II. *Of the Office and Duty of an* Administrator, *as distinguished from those of an* Executor.

An administrator is one to whose charge are committed, by the ecclesiastical court, the goods and chattels of a person dying intestate.

The various sorts of administrators.

Administrators may be of various sorts, administrators *durante minore ætate, i. e.* during the minority of an infant executor or administrator; *durante absentia, i. e.* during the absence of the executor or administrator out of the kingdom; or *pendente lite, i. e.* during the pendency of a suit in the ecclesiastical court, concerning the validity of the will. 2 *Peere Will.* 589. 1 *Salk.* 42. 4 *Mod.* 15.

Administration granted during the infancy of an executor, till very lately ceased upon his arriving at the age of 17 years, at which age the spiritual court allows a person to take upon himself the executorship; but administration during the infancy of an administrator, always subsisted until the party attained 21, for an administrator is a trustee, and no one can act as a trustee till full age. *Salk.* 39. And by 37 Geo. 3. c. 7. the same is now the law in respect of an infant executor. See *ante* p. 50.

And in the first case, if the person appointed by the testator were a female infant, the administration would have ceased on her marriage with a person of 17, as her husband might then administer as executor. 5 *Co.* 29. but otherwise of an infant administratrix. And the like, it is presumed, would still be the case in regard to a female infant executrix marrying a person of the age of 21.

And where a testator makes a will without appointing any executor, or names persons incapable of acting, or if the executors named refuse to act, the ordinary must grant administration *cum testamento annexo, i. e.* with the will annexed. And *note*, temporary administrations of this sort, not being within the stat. 31 Ed. 3. need not be granted to the next of kin. *Hob.* 250. 1 *Roll. Ab.* 907. 2 *Peere Will.* 576.

And in case the course of representation, from executor to executor, is interrupted by administration, it is necessary for the ordinary to commit administration afresh of the goods of the deceased not administered by the former executor, or administrator; for an administrator being merely an officer of the ordinary, in whom the testator has reposed no confidence, the administrator of the testa-

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tor's executor, or the executor of the inteſtate's adminiſtrator, is not allowed to be the repreſentative of the deceaſed, as the executor of the teſtator's exeçutor is; therefore on the death of an adminiſtrator, it reſults back to the ordinary to appoint another. And ſuch an adminiſtrator is ſtiled adminiſtrator *de bonis non*, who is then the only repreſentative of the deceaſed in matters of perſonal property. *Sty.* 225.

Where the perſon has *bona notabilia*, *(i. e.)* perſonal property of the value of £5 in ſeveral dioceſes of the ſame archiepiſcopal province, adminiſtration muſt be taken out in the prerogative or archbiſhop's court. *Salk.* 39. And if the *bona notabilia* be in different dioceſes of different provinces, there muſt be a prerogative adminiſtration in both. *Ibid.* But if they are in one dioceſe of each province, adminiſtration will be granted by the biſhop of each dioceſe, of the goods, &c. within their reſpective juriſdictions, and if one dioceſe only, then by the biſhop of that dioceſe. *Ibid.*

If full adminiſtration be granted by a dioceſan biſhop, where there are *bona notabilia* in other dioceſes, the adminiſtration is abſolutely void; but if a prerogative adminiſtration is granted where the deceaſed had *bona notabilia* in one dioceſe only, the adminiſtration is not abſolutely *void*, but only *voidable* upon expreſs application for that purpoſe. 1 *Stra.* 74.

And note, that bonds and other *ſpecialties*, are *bona notabilia* in the dioceſe where they happen to be at the time of the inteſtate's death, but *ſimple contract* debts and ſecurities are ſuch only in the dioceſe where the debtor then reſided. *Cro. Eliz.* 472.

And either of the above ſpecies of adminiſtrators may have a limited or ſpecial adminiſtration committed to his care, *viz.* of certain ſpecific effects, as a term of years or the like, and the reſt may be committed to others. 1 *Salk.* 36.

But where a perſon dies wholly inteſtate, without either will or executors, then *general* adminiſtration is to be granted of his effects, according to the direction of 31 Ed. 3. c. 11, and 21 Hen. 8. c. 5.

The adminiſtrator, on his appointment is required to enter into a bond for duly adminiſtering the inteſtate's effects, and ſhould he neglect the requiſitions of the bond, he may, with the permiſſion of the ordinary, be ſued by any of the creditors, or next of kin of the deceaſed; both

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of which are intereſted in the diſtribution of his effects, *Cowp.* 140.

Who intitled to adminiſtration.

Before the ſtat. of Weſtminſter 2, the ordinary had the abſolute diſpoſal of the inteſtate's eſtate, in order that he might diſtribute it for purpoſes of charity. By that ſtatute he was permitted to retain only the reſidue, after payment of debts; but the flagrant abuſes even of that power occaſioned the legiſlature again to interpoſe, in order to prevent the ordinaries from keeping the adminiſtration any longer in their own hands, or thoſe of their immediate dependants; and therefore, by ſtat. 3 Ed. 3. c. 11, it is provided that in caſe of inteſtacy, the ordinary ſhall depute the neareſt and moſt lawful friends of the deceaſed to adminiſter his goods; and theſe are interpreted, 9 *Co.* 39, to be the next in blood of the inteſtate, not being under any legal diſability, who are alſo by that ſtatute put upon the ſame footing, as to accounting, as executors appointed by will. Adminiſtrators therefore are only the officers of the ordinary, appointed by him in purſuance of this ſtatute. The ſtatute of 21 Hen. 8. c. 5. enlarges a little the power of the eccleſiaſtical judge, and permits him to grant adminiſtration either to the widow or the next of kin, or to both of them at his diſcretion; and where two or more perſons are in the ſame degree of kindred, gives the ordinary his election to accept which he pleaſes. 2 *Black Com.* 496.

In conſequence of theſe ſtatutes then the ordinary is now compellable to grant adminiſtration of the goods and chattels.

1. Of the wife's effects to the huſband or his repreſentatives. *Cro. Car.* 106. 1 *Peere Will.* 381. And of the huſband's effects to his widow, *or* next of kin; but he may grant it to either, or both, at his diſcretion. *Stra.* 532.

Adminiſtration, during minority, need not it ſeems be granted, according to the ſtatute, "becauſe there is an executor all the while." *Hob.* 250.

2. That amongſt the kindred of the inteſtate thoſe are to be preferred that are neareſt in degree; but of perſons of equal degree the ordinary may chuſe which he will.

3. That this nearneſs or propinquity of degree ſhall be reckoned according to the computation of the civilians, and not of the canoniſts, becauſe in the civil computation the ſeveral degrees are numbered from the teſtator himſelf, and not from the common anceſtor, ac-

cording to the rule of the canoniſts. *Prec. Chan.* 593. 2 *Vez.* 215. ADMINISTRATORS.

In the firſt place, therefore, the children, or on failure of the children, the parents of the deceaſed, are entitled to the adminiſtration, both which are indeed in the firſt degree; but with us the children are allowed the preference.

Then follow brothers, grandfathers, uncles, or nephews, and the females of each claſs reſpectively. 1 *Peere Will.* 40. *Prec. Chan.* 527. 1 *Atk.* 454.

And the couſins of the inteſtate are entitled to adminiſter on failure of all theſe. 2 *Black. Com.* 505.

4. The half blood is admitted to the adminiſtration as well as the whole, for they are equally akin to the inteſtate, and only excluded from the inheritance of land upon feodal reaſons. The brother of the half blood will, therefore, exclude the uncle of the whole blood; and the ordinary may grant adminiſtration to the ſiſter of the half blood or the brother of the whole blood at his diſcretion. 1 *Vent.* 425. 1 *Show.* 108. 2 *Vern.* 124.

5. If none of the kindred of the teſtator will take out adminiſtration, a creditor is allowed to do it. 1 *Salk.* 38.

6. And by 38 Geo. 3. c. 87. it is enacted, that if at the end of 12 months from the death of any teſtator, the executor to whom probate ſhall have been granted, is reſiding out of the juriſdiction of the king's courts, a creditor may, upon application, obtain letters of adminiſtration for the purpoſe of having his demand ſatisfied out of the aſſets of the teſtator.

7. If the executor of a teſtator refuſe to account, or die inteſtate, adminiſtration may be granted to the reſiduary legatee, in excluſion of the next of kin. 1 *Sid.* 281. 1 *Vent.* 219. And,

8. In defect of all theſe, the ordinary may commit adminiſtration (as he might have done before the ſtatute of Ed. 3.) to ſuch diſcreet perſon as he approves of. *Wentw.* c. 14.

9. Or the ordinary may grant to any one letters *ad colligendum bona defuncti*, viz. to collect in the goods of the deceaſed, which makes him neither executor nor adminiſtrator, his only buſineſs in this caſe being to keep the goods in his ſafe cuſtody, and do other proper and neceſſary acts for the benefit of ſuch as are entitled to the property of the deceaſed. 2 *Black. Com.* 505.

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10. And by the ſaid act of 38 Geo. 3. it is provided, that where an infant under the age of 21, is ſole executor, adminiſtration with the will annexed, ſhall be granted to the guardian of ſuch infant, or to ſuch other perſon as the ſpiritual court ſhall think fit, until ſuch infant ſhall attain the age of 21 years, and ſuch adminiſtrator ſhall have the ſame powers veſted in him as adminiſtrator *durante minore ætate*, of the next akin.

In caſe of a baſtard's dying inteſtate without wife or iſſue, or any other perſon dying without kindred, the king is entitled to his perſonal property, as adminiſtrator. 3 *Peere Wil.* 33;—but in the caſe of a baſtard, it is uſual for the crown to grant adminiſtration to ſome relation of the baſtard's father or mother, reſerving only a tenth part, or ſome other ſmall portion, by way, it is preſumed, of preſerving its rights. 1 *Wood*, 398.

If there be two or more adminiſtrators, one of them cannot alone, as an executor may, releaſe the debts of the inteſtate, or otherwiſe diſpoſe of his property, but all muſt join, it not being a *ſeveral* but *joint* authority, that is delegated to them by the ordinary. 1 *Atk.* 460.

## III. *The general Duties and Functions of both Executors and Adminiſtrators.*

1. In reſpect of the funeral of the deceaſed and the probate of his will.

2. Relative to their general power over the property of the deceaſed.

3. Relative to the diſtribution of his effects.

1. Burial of deceaſed.

1. The office and duty of executors and adminiſtrators, in burying the deceaſed, and proving his will.

The *firſt* thing to be done by an executor or an adminiſtrator, in diſcharge of their ſeveral duties, is to inter the deceaſed in a manner ſuitable to his rank in life, and the eſtate he has left behind him. And neceſſary funeral expences are allowed, previous to all other debts and charges; but if the executor or adminiſtrator be extravagant, it is a waſte of the ſubſtance of the teſtator or inteſtate, which ſhall be prejudicial to themſelves only, and not to the creditors or legatees of the deceaſed. 1 *Salk.* 296.

And it has been ſaid, that in ſtrictneſs "no funeral expences are to be allowed, as againſt *creditors*, except for

the coffin, ringing the bell, and the parſon's, clerk's, and bearer's fees, (and none for pall and other ornaments) the ſum allowed for which has uſually been from 40s. to £5, according to circumſtances. See 1 *Salk.* 296. 3 *Atk.* 249. But this rule has ſince been conſtrued with more liberality, eſpecially were a teſtator leaves great ſums in legacies, which is a reaſonable ground for an executor to believe him to be ſolvent. *Ibid.* & 3 *Atk.* 119.

Probate of will.

The *ſecond* thing to be done by an executor, or by a *ſpecial* adminiſtrator, (*viz.* during infancy, abſence, litigation, or adminiſtration with the will annexed) is to prove the will of the deceaſed; which may be done either in common form, by taking the oath duly to diſtribute, &c. or, in caſe the will be diſputed, in a more ſolemn form, by witneſſes of its due execution, &c. which being done under the eye of a court of juſtice, and neceſſarily conducted by profeſſional gentlemen, is beyond the limits of the preſent treatiſe.

And to prevent delay in diſtributing the effects of the deceaſed, (as alſo to prevent the revenue being defrauded) it is enacted by 37 Geo. 3. c. 9. ſec. 10. that every perſon who ſhall adminiſter the perſonal eſtate of any perſon dying, without proving the will of the deceaſed, or taking out letters of adminiſtration within 6 calendar months after the perſon's deceaſe, ſhall forfeit £50. (a)

When the will is proved, the original is to be depoſited in the regiſtry of the ordinary, where a copy is made upon parchment, under the ſeal of the ordinary, and delivered to the executor or adminiſtrator, together with a certificate of its having been proved before him; and this is what is called the *probate*.

In caſe there be no will, the perſon entitled to be adminiſtrator muſt in like manner, at this period, take out letters of adminiſtration under the ſeal of the ordinary, by which is veſted in him an executorial power, to collect and diſtribute the goods and chattels of the deceaſed; and in purſuance of a ſtatute paſſed in the 22 and 23 of Car. 2. he muſt enter into a bond with

(a) One moiety thereof to go to the king, and the other to the perſon who ſhall ſue for the ſame; the action to be commenced within 6 months after the time when probate or adminiſtration ought to have been taken out.

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ſureties, to the ſatisfaction of the ordinary, faithfully to execute his truſt.

If all the goods of the deceaſed lie within the ſame juriſdiction, the probate is to be made, or adminiſtration taken out, before the ordinary, or biſhop of the dioceſe where the deceaſed lived; but if the deceaſed had goods or chattels to the value of £5, (which in thoſe days were equal to about £70 of our money, 2 *Black. Com.* 509.) in two diſtinct dioceſes or juriſdictions, then the will muſt be proved, or adminiſtration taken out, before the metropolitan or archbiſhop of the province in which the deceaſed died, by way of *ſpecial prerogative*. Whence it is, obſerves Sir W. Blackſtone, 2 *Com.* 508. that the offices where the validity of ſuch wills is tried, are called the *prerogative* offices. A prerogative, grounded upon the foundation, which we formerly noticed, *viz.* that as adminiſtrators are in effect nothing more than the officers of the ordinaries, and as the biſhops were originally adminiſtrators to all perſons dying inteſtate within their own dioceſes, it was impoſſible for them to collect any goods of the deceaſed, except thoſe which lay within ſuch dioceſes, beyond which their epiſcopal power does not extend. But it would be extremely troubleſome, if as many adminiſtrations were granted as there are dioceſes within which the deceaſed had effects of the value of £5; beſides the uncertainty which creditors and legatees would be at, if different adminiſtrations were granted, to know out of which fund their demands were payable: a prerogative is, for theſe reaſons, veſted in the metropolitan of each province, to make, in ſuch caſes, one adminiſtration ſerve for all. The probate of wills naturally follows the power of granting adminiſtrations, in order to ſatisfy the ordinary that the deceaſed has in a legal manner, by appointing his own executor, excluded him from the privilege of adminiſtering the effects. *Vid.* 2 *Black. Com.* 509.

2. General power over the property of the deceaſed.

2. An executor, by virtue of the will of the teſtator, and an adminiſtrator by virtue of his adminiſtration, have an intereſt in all the goods and chattels, whether real or perſonal, in poſſeſſion or in action *(a)*, of the deceaſed; and all ſuch goods and chattels which come to their hands

*(a)* Things in action are debts and other duties *due* to the teſtator, but *not got into poſſeſſion*.

will be *aſſets (b)* to make them chargeable to creditors and legatees.

And if the property of the deceaſed be loſt, or become irrecoverable through their wilful negligence, they will be liable to make it good. 2 *Brow. Ch. Ca.* 111. 156. 231. 1 *F. Vez.* 291.

And ſo if they retain money in their hands longer than is neceſſary, they ſhall be chargeable with intereſt, and coſts, if any incurred. 3 *Ibid.* 73. 413.

But one executor ſhall not he anſwerable for money received, or detriment occaſioned by the other of them, unleſs it has been by means of ſome *joint* act done by them. *Ibid.* 73.

Executors and adminiſtrators have in general the ſame remedies againſt others, for recovering debts and duties due to the deceaſed, as he would have had if living.

And adminiſtrators are entitled by ſtat. 31 Ed. 3. as executors are by the common law, to every ſpecies of *action* proper to recover debts due to the deceaſed, which he might have had during his life-time.

But they cannot maintain an action againſt another for any *perſonal* injury done to the deceaſed, when ſuch injury is of a nature for which damages may be recovered; for it is a rule of law, that *perſonal* actions die with the *perſon*; it never, therefore, can be revived, either by or againſt the executors or other repreſentatives of the deceaſed.

But in actions ariſing from breach of promiſe or the like, where the right deſcends to the repreſentatives of the party, though the ſuit ſhall abate by his death, yet it may be reſumed by or againſt his executors or adminiſtrators; for actions of this laſt deſcription are actions againſt the *property* of the deceaſed, in which the executors or adminiſtrators have the ſame intereſt that the teſtator or inteſtate had when living. *March.* 14. 3 *Black. Com.* 302.

And ſo likewiſe may they ſue for rent in arrear and due to the deceaſed in his life-time; and may alſo diſtrain the lands, &c. charged with the payment of it, ſo long as the ſame lands, &c. continue in the ſeiſin or poſſeſſion of the tenant, or of any other perſon claiming only from the ſaid tenant by purchaſe, gift, or deſcent, in like manner as their teſtator might have done if living. 32 Hen. 8. c. 37.

And by the ſame ſtatute the executors or adminiſtrators of any perſon, having an eſtate in fee-ſimple, fee-tail, or

(b) *Aſſets* are goods, &c. beyond what is ſufficient to pay the neceſſary funeral expences of the deceaſed.

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for life, in any rents or fee farms which ſhall have been due and unpaid in the life-time of his wife, ſhall, in caſe of the deceaſe of the huſband, have action of debt for the arrears, or may diſtrain for the ſame, in like manner as if his wife were alive.

And ſo of the executors or adminiſtrators of other perſons having any rents or fee farms for term of life. *Ibid.*

And by 11 Geo. 2. c. 19. it is provided, that when tenant for life of any lands, tenements, or hereditaments, ſhall happen to die before or on the day on which any rent was reſerved or made payable upon any demiſe of any lands, tenements, or hereditaments, which determined on the death of ſuch tenant for life, the executors or adminiſtrators of ſuch tenant for life ſhall, in an action on the caſe, recover of the tenants, or undertenants of ſuch lands, &c. if the ſaid tenant for life die on the day on which the ſame was made payable, the whole, or if before ſuch day, then a proportion of ſuch rent, according to the time ſuch tenant for life lived of the laſt year, or quarter of a year, or other time in which the ſaid rent was growing due.

Alſo by the cuſtom of merchants, an executor or adminiſtrator, may indorſe over a bill of exchange, or promiſſory note. 3 *Wilſ.* 1.

An executor or adminiſtrator may alſo, on the death of a leſſee for years, aſſign over the leaſe, and ſhall not be anſwerable for rent after ſuch aſſignment. *Cro. Eliz.* 715. 3 *Co.* 24. Nor ſhall they be liable for rent due after the leſſee's death, from premiſſes which he had in his life-time aſſigned to another. *Ibid.*

As to what covenants, &c. in leaſes, executors and adminiſtrators are bound to perform, we muſt refer to that diviſion of our work which treats of the laws concerning *Landlord and Tenant*, obſerving only generally here, that they are bound by ſuch covenants only of the deceaſed, as are as it were attached to or in the legal phraſe, "run with the land."

3 Diſtribution of the effects of the deceaſed.

3. The executor or adminiſtrator in order to the diſtribution of the effects of the deceaſed is to make an inventory of all the goods and chattels, whether real or perſonal, in poſſeſſion or in action, of the deceaſed, which, if required, muſt be delivered to the ordinary upon oath. And which, if ſo delivered, no creditor is at liberty to object to, 21 Hen. 8. c. 5. but it being thus binding upon the parties intereſted, it is by the ſame ſtatute required to be made in the preſence of two credible witneſſes.

They are then to collect in, as ſoon as they conveniently can, all the goods and chattels ſo inventoried, for which purpoſe the law has conferred on them extenſive powers and intereſts, they being the repreſentative of the deceaſed, and having the ſame property in his goods and chattels as their principal had when living, and the ſame remedies (as we have before ſeen) to recover them.

Whatever is recovered that is of a ſaleable nature, and can be converted into money, is called *aſſets* in the hands of the executor or adminiſtrator (from the French word *aſſez*, enough) and makes him chargeable to that amount, to creditors, legatees, and the kindred of the deceaſed.

Order of payment of debts.

Out of theſe the executor or adminiſtrator is to pay the debts of the deceaſed; and in doing this he ought to be particularly careful to obſerve the rules of priority eſtabliſhed by law, for otherwiſe, in caſe there ſhould be a deficiency of aſſets, and he pay debts of a lower degree firſt, he will be obliged to anſwer thoſe of a higher out of his own eſtate *(a)*. Theſe are as follows,

1. He is to diſcharge the funeral charges, the expence of proving the will, and other neceſſary expences incurred by the execution of his truſt.

2. Debts due to the king on record or ſpecialty. 1 *And.* 129.

3. Debts required by particular acts of parliament to be preferred to others, which are principally forfeitures for not burying in woollen, by 30 Car. 2. c. 3. Money due from overſeers of the poor for rates, 17 Geo. 2. c. 38; and money due to the poſt-office for letters, by 9 Anne, c. 10.

4. Debts appearing to be due by the evidence of a court of record, as judgments (if properly docquetted according to 4 and 5 Will. & Mar. c. 20), ſtatutes and recognizances; and thoſe recognized by a decree of a court of equity: as alſo debts due on mortgage. *Cro. Car.* 363. 4 *Co.* 60. 3 *Peere Wil.* 401.

5. Debts due to individuals on ſpecial contract, *viz.*

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*(a)* But it is to be obſerved that the payment of debts according to their priority, applies only to *legal* aſſets, *i. e.* to ſuch effects of the teſtator as can be recovered by recourſe to a court of *law*, in contradiſtinction to thoſe which can be recovered only by the aſſiſtance of a court of *equity*. 2 *Atk.* 50. 1 *Brow. Ch. Rep.* 128. Concerning *equitable* aſſets, ſee poſt. p. 64.

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debts due on bond, or other inſtrument under ſeal, and alſo rent in arrear. *Wentw.* c. 12.

If however ſuch bond, &c. be proved to have been entered into without any good or valuable *conſideration*, a court of equity will direct it to be poſtponed to *ſimple* contract debts. 3. *Peere Wms.* 222.

And it is here material to notice that debts of *record*, mentioned in the preceding paragraph, the executor or adminiſtrator is bound to take notice of, at his peril. 2 *Vern.* 88. But not ſo as to debts due upon bond or other ſpecialty; for although he is required to pay debts according to their priority, yet he is allowed to pay a ſimple contract debt, before a debt upon ſpecialty, if he has no notice of ſuch ſpecialty, for otherwiſe the executor or adminiſtrator might be ruined by the obligor's purpoſely withholding his bond, &c. till all the aſſets of the teſtator or inteſtate had been diſtributed. 2 *Bac. Abr.* 43. 2 *Fonbl. Eq.* 407. n. (*m*).

6. Debts on ſimple contract, *viz.* debts ariſing by mere verbal promiſe, or by writing not under ſeal, as notes of hand, &c. and amongſt theſe wages due to ſervants are to be firſt paid. 1 *Roll. Ab.* 927.

And if no ſuit be commenced againſt an executor or an adminiſtrator, he may pay any one creditor of equal degree the whole debt, though there ſhould be inſufficient remaining to ſatisfy the reſt; for till ſuit commenced he has no legal notice of the debt. *Dy.* 32. 2 *Leo.* 60.

And it has been held, that even after a ſuit is commenced, he may ſtill, by confeſſing judgment to other creditors of the ſame degree, give them a preference. 1 *Peere Wil.* 295.

For otherwiſe if ſeveral actions ſhould come to be tried, at the ſame time, he might be doubly charged, and anſwer the value twice over *(a)*. *Fr. Eq.* 411. And ſee 2 *Fonbl. Eq. Ibid. n. r.* and 412, *n. (s)*

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*(a)* It may be here proper to obſerve, that ſhould the executor or adminiſtrator find the aſſets of the deceaſed ſo incumbered with various debts, as to render it unſafe for him to adminiſter them of his own diſcretion, he may apply to a court of equity to have them arranged according to their real priority. 2 *Vern.* 37. And this delay can in no caſe be attended with inconvenience to him, as he cannot be *arreſted* for the debts of the deceaſed, unleſs indeed he is *waſting* the aſſets. 3 *Wilſ.* 368.

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And *note*, executors and adminiſtrators are allowed, amongſt debts of equal degree, to pay themſelves firſt, by retaining in their hands, or paying to their co-executors or adminiſtrators ſo much as their reſpective debts amount to.

The reaſon of which is, that an executor or adminiſtrator cannot, without an apparent abſurdity, commence an action againſt themſelves, as repreſentatives of the deceaſed, for that which is due to them in their reſpective private capacities: and if this privilege were not allowed them, they would be put in a worſe ſituation than the reſt of the creditors, becauſe as they cannot commence any ſuit, they muſt neceſſarily be paid laſt, and would therefore, in caſes where the eſtate of the teſtator or inteſtate proves inſolvent, loſe their debt. *Plow.* 543.

But they are not allowed to retain their own debt to the prejudice of thoſe of a higher degree, for the law only intends to put them in the ſame ſituation as if they had themſelves ſued and recovered their debts, which they could not have done whilſt debts of a higher degree were ſubſiſting, *Viner*, tit. *Exeecutors* D.

Neither ſhall an executor or adminiſtrator be allowed to retain his own debt, in preference to that of his co-executor or co-adminiſtrator, of equal degree, but both ſhall be diſcharged in equal proportion. 3 *Black. Com.* 18.

The *perſonal* eſtate of the teſtator is the proper fund for the payment of his debts, becauſe money borrowed, goods delivered, &c. went to the augmentation of the perſonal eſtate; yet if the teſtator expreſsly directs, that they ſhall be paid out of his *real* eſtates only, and they are ſufficient for the purpoſe, the perſonal will be exonerated. 1 *Brow. Ch. Rep.* 462. 2 *Ibid.* 60. 3 *F. Vez.* 475.

And on the principle of the perſonal eſtate being the proper fund for payment of debts, a mortgage made by the teſtator muſt be diſcharged by the executor or adminiſtrator out of the perſonal eſtate, if there be ſufficient to pay the reſt of the creditors and legatees, for the mortgage muſt have increaſed the perſonal eſtate to that extent. 2 *Cox, Peere Wil.* 664. 2 *Brow. Ch. Rep.* 101. But where the mortgage was not incurred by the teſtator or inteſtate, it is not payable out of the perſonal eſtate, becauſe in that caſe the reaſon does not apply. *Ibid.*

Where the teſtator leaves his real eſtate to truſtees or executors, for the payment of his debts, they become what

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are called *equitable aſſets*, in their hands, and are diſtributable according to the principles of equity, to all the creditors of whatever degree in the ſame proportion. 2 *Atk.* 50. 1 *Brow. Ch. Rep.* 138. And even creditors, whoſe demands are barred at law, by the ſtatute of limitations, will be let in. 2 *Vern.* 141. But a deviſe for payment of debts, muſt *provide for ſuch payment* in a *practical manner*, or it will not be taken out of the ſtatute. 2 *Brow. Ch. Ca.* 614.

Equitable aſſets are, generally ſpeaking, ſuch as cannot be attained without aſſiſtance of a court of equity; but this does not hold invariably, for the diſtinctions which prevail, we ſhall refer the reader to 2 *Fonbl. Eq.* 401, whence it will be collected, that aſſets may be conſidered as *equitable*, 1. When the teſtator's eſtates are charged generally with the payment of his debts, and the deſcent to the heir is at the ſame time broken, (ſo that he takes by *purchaſe*, and not by deſcent). 2. When the teſtator has purely an *equitable* intereſt in the eſtate deviſed, and that equitable intereſt has been made aſſets by any ſtatute.

And agreeably to the above rule, if creditors on ſpecialty have received a part of their debts out of the perſonal eſtate, they cannot receive out of the equitable fund till the other creditors have been paid an equal proportion of *their* debts. 3 *Peere Wil.* 322.

Creditors on ſpecialty, by which the deceaſed has bound himſelf and his *heirs*, may reſort to the heir, or to the executor or adminiſtrator, at their option; but if, by having recourſe to the executor or adminiſtrator, they ſo far exhauſt the perſonal eſtate, as not to leave ſufficient for the payment of the creditors by ſimple contract, and alſo the legatees, a court of equity will enable theſe to recover from the heir the amount of what the ſpecialty creditors had ſo taken from the perſonal fund. 1 *Vez.* 312.

When all the debts of the teſtator or inteſtate are diſcharged, the next thing which claims regard are the legacies of the deceaſed, which are to be paid by the executor or adminiſtrator as far as his aſſets will go. 2 *Vern.* 434.

The ſubject of legacies may ſeem to relate rather to the office of an *executor*; but it is to be recollected, that where a teſtator appoints no executor, or the executors refuſe to

act, and in all other cases where it becomes necessary to grant a special administration, the administrator has the same charge over legacies as a regular executor; and it would, besides, have too much broken in upon the order of distribution, to have treated of legacies in any other place. EXECrs. & ADMINrs.

The law respecting legacies being attended with some nicety; it will be proper to be somewhat particular in our observations upon it.

A legacy is a gift or bequest of goods or chattels, by testament. The bequest transfers an inchoate property in the legacy, but it is not complete without the assent of the executor, *Co. Lit.* 111; for, in him all the goods and chattels of the deceased are vested, and it is his business, first of all, to see whether there is a sufficient fund left to pay the debts of the testator; the rule of equity being, that a man must be just before he is permitted to be generous. 2 *Black. Com.* 512.—And in case of a deficiency of assets, all the general and pecuniary legacies must abate proportionably, in order to pay the debts; a *specific* legacy however (viz. a gift of a particular and identical thing as distinguished from *money*) is not to abate, unless there be not sufficient without it. 2 *Vern.* 111.

And so if legatees have been paid their legacies, and debts afterwards come in more than sufficient to exhaust the residue, they must refund a rateable part of what they have received. *Ibid.* 205.

It is a general rule, that if the legatee die before the testator, the legacy will (unless the contrary be expressed,) be a lapsed legacy, *i. e.* will be lost, and sink into the residue of the testator's estate; and this is more particularly the case, in favour of the heir, where it is charged upon a *real estate*. 1 *Atk.* 50. 2 *Peere Will.* 601, and see *Ibid.* 612. n. (1.) and 3 *Brow. Ch. Ca.* 5. 108.—3 *Vez. jun.* 136. Lapse of legacies.

But the rule admits of many exceptions; and wherever it can be collected from the expressions or general import of the will, that it was the testator's intention to make it a vested legacy, it will be so, and go, in case of the death of the legatee, to his personal representatives. 1 *Peere Will.* 457. *Co. Lit.* 237. 3 *Brow. Ch. Ca.* 471. and see 3 *Vez. jun.* 450. 536.

So in general, where the legacy is charged upon the *personal* fund only, it will be an immediate interest, and

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be payable to the perſonal repreſentative of the legatee, notwithſtanding his death prior to that of the teſtator, unleſs the contrary be evidently intended. 1 *P. Wms.* 457.

In the conſtruction of legacies, a diſtinction has prevailed, grounded on the civil law, between a bequeſt to a man, *if* or when he attain a certain age, and a bequeſt to him *payable* at that age. In the firſt caſe the event of attaining the age ſpecified is held to apply to the ſubſtance of the legacy, and therefore will be loſt by the death of the legatee before the time; but in the other caſe, the event of attaining the ſpecified age is conſidered as applying not to the ſubſtance of the bequeſt, but merely to the time of payment; ſo that here the legacy does not lapſe by the death of the legatee before the time of payment. *Ibid.* and 3 *Brow. Ch. Ca.* 404. 471. 3 *Vez. jun.* 543.

And the ſame holds in reſpect of lands which will in either caſe be veſted in the devizee; and on his death deſcend to his heir. 3 *Term Rep.* 41. 3 *Vez. jun.* 135. 543.

And though, agreeably to this rule, the time ſpecified do refer to the ſubſtance of the legacy, yet if the teſtator direct intereſt to be paid in the mean time, it will nevertheleſs be a veſted legacy, for ſuch muſt be preſumed to have been the teſtator's intention; but ſuch preſumption is not furniſhed by any maintenance being given leſs than the intereſt. 2 *Brow. Ch. Rep.* 3. 3 *Ibid.* 416.

And if it appear from the will, that the time of payment of a legacy be poſtponed on account of the circumſtances of the teſtator's eſtate, and not on account of the circumſtances of the legatee, it ſhall be paid, notwithſtanding the previous death of the legatee; and that though it be charged upon the real eſtate, and payable at a future time. See 2 *Peere Will.* 612, and *Co. Lit.* 237. *a.* n. (1.) where the caſes on this head are collected and obſerved upon.

And where a legacy is given over to another in caſe the firſt legatee die under a certain age or the like, the legacy is payable immediately on the death of the firſt legatee; and though it be not given over, yet if it carry intereſt, his repreſentative will be immediately entitled to it; and in this caſe it is held, that if the intereſt allowed by the teſtator is leſs than what a court of equity would allow, the teſtator's executor will be entitled to the difference, until ſuch time as the firſt legatee would, had he lived,

have attained the age ſpecified. 2 *Peere Will.* 478. 1 *Brow. Ch. Rep.* 105.

And in caſe of a veſted legacy due immediately, and charged on land, or money in the funds, which yield an immediate profit, intereſt ſhall be payable from the teſtator's death; but if it be charged on the perſonal eſtate only, which cannot be immediately got in, it will carry intereſt only from the end of the year after the death of the teſtator. 2 *Peere Will.* 26; 1 *Vez. jun.* 367. 408. unleſs it be a child or children of the teſtator, who might otherwiſe periſh before the end of the year for want of a proper maintenance. 1 *Vez.* 310. 2 *Brow. Ch. Ca.* 58.

And if it be for neceſſaries, and the legacy be ſmall, the executors will be juſtified in advancing a part of the principal; but great circumſpection ſhould be uſed in caſes of this ſort, otherwiſe they may poſſibly be obliged to pay the full legacy on the infant's attaining twenty-one, without deducting the ſums previouſly advanced. See 3 *Brow. Ch. Ca.* 178.

Legacy cauſa mortis.

Beſides theſe formal bequeſts made by a man's laſt will or teſtament, there is alſo permitted another death-bed diſpoſition of property, which is called a diſpoſition *cauſa mortis, i. e.* in contemplation of death; which is where a man in his laſt ſickneſs delivers, or cauſes to be delivered, to another ſome goods, &c. to keep, or otherwiſe diſpoſe of in caſe of his deceaſe. 2 *Black. Com.* 513. 4 *Brow. Ch. Ca.* 72. This gift, if the donor dies, is good without the aſſent of the executor, but it will not prevail againſt creditors; and it is accompanied with the implied truſt, that if the donor recover, it ſhall revert to him again. *Prec. Chan.* 269. 3 *Peere Will.* 357.

Bonds, drafts upon a banker, bank notes, and bills payable to bearer, have been held to paſs by this mode of diſpoſition; but promiſſory notes or bills of exchange, being payable at a future day, are choſes in action, and cannot paſs by delivery. 2 *Vez.* 431. 3 *Peere Will.* 357. and 1 *Brow. Ch. Ca.* 612. 4 *Ibid.* 72. 286. where the nature and effect of this kind of diſpoſition is much conſidered, and many diſtinctions marked out relative to its efficacy in particular caſes.

We have now endeavoured to explain to the reader, the moſt obvious and general rules upon the ſubject of legacies, without encumbering his memory with the more ſubtile diſtinctions, which are generated and governed by

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the peculiar circumſtances of particular caſes; for theſe we muſt refer him to more voluminous treatiſes, amongſt which we cannot omit *Tr. Eq. B.* 4. *c.* 1, and 2. *(Fonb. Ed.)* where the ſubject is treated with conciſeneſs and perſpicuity. See alſo 2 *Blac. Com.* 512. and 3 *Vez. jun. Index.*

As to the *reſiduary* effects of the teſtator.

7. When all the debts and particular legacies are diſcharged, the ſurplus or reſidue muſt be paid to the reſiduary legatee, if there be any appointed by will; but if there be none, it will go to the executor or to the next of kin, according as it can be collected from the will to which of them the teſtator intended it ſhould go.

Thus where a competent legacy is given to the executor, the undeviſed reſidue of the teſtators eſtate ſhall be divided amongſt the next of kin; for in that caſe it is impoſſible but to infer that the teſtator did not intend that his executor ſhould have the reſidue, as it would have been abſurd to give him expreſsly a part, if he meant he ſhould have the whole. 2 *Vez.* 97. 1 *Brow. Ch. Ca.* 154. 201. 1 *Vez. jun.* 66. and though the teſtator's wife be his executrix, it makes no difference. 1 *Brow. Ch. Ca.* 154. 4 *Ibid.* 239. 326.

But where ſuch an inference cannot fairly be drawn from the circumſtances of the will, the executor ſhall generally be allowed to retain the reſiduary fund to his own uſe, as if the whole of the perſon's perſonal eſtate is legally veſted in him by the will. *Prec. Chan.* 323. 1 *Peere Will.* 544. 2 *Ibid.* 338. 3 *Ibid.* 43. 194. 1 *Vez. jun.* 67.

So that where a legacy was given to one of two executors, it was held that they ſhould notwithſtanding take the reſidue, for the legacy might have been given merely to ſhew a preference to one executor above the other, and not to preclude them from the reſidue. 1 *P. Will.* 550, *Cox. ed. Prec. Ch.* 323. 2 *Vez.* 166. 2 *Atk.* 220. 1 *Brow. Ch. Ca.* 328. 590. 2 *Ibid.* 220. but it is otherwiſe when two equal legacies are given to both. 3 *Brow. Ch. Ca.* 110.

But if the reſidue be given to one who dies in the teſtator's life-time, and the bequeſt conſequently lapſed, the executor ſhall not therefore have it, though no legacy be given him; for by diſpoſing of it to another, the teſtator has expreſsly ſhewn that he did not intend it ſhould go to his executor. 3 *Brow. Ch. Rep.* 28. 1 *Vez. jun.* 475. and ſo in all other caſes, where from the tenor of the will it can be ſatisfactorily collected, that the teſtator *intended* to

exclude him from the reſidue. But, otherwiſe the *law* ſhall prevail. See the caſes on this head arranged and obſerved upon. 2 *Fonb. Eq.* 131. *n. (k).*

And in caſes where the executor is excluded, and there are no kindred of the teſtator; the executor will be conſidered as a truſtee for the crown. 1 *Brow. Ch. Ca.* 201.

Laſtly, it may be noticed, that where executors take the reſidue, they are held to be *jointenants* of ſuch reſidue, ſo that if one of them die before partition, his part will ſurvive to the other. 2 *Brow. Ch. Ca.* 220.

How reſidue to be diſtributed.

This reſidue, when it does not go to the executor, is to be diſtributed amongſt the next of kin to the inteſtate, according to the ſtatute of diſtributions, 22 & 23 Car. 2. c. 10, explained by 29 of the ſame king, c. 30, relative to the ſurpluſage of the effects of inteſtates, which by theſe ſtatutes are directed, after the expiration of one whole year from the death of the deceaſed, to be diſtributed in the following manner, *viz.*

If the deceaſed leave a wife and children, one third of his eſtate, after payment of debts, is to be given to the widow, and the reſidue to the children in equal proportions, or if any of them be dead, to their repreſentatives, *i. e.* lineal deſcendants.

But by the aforeſaid ſtatute, no repreſentatives are admitted amongſt *collateral* relations, beyond *nephews* or *nieces* of the deceaſed, after which it is to be recollected that the diſtribution will be *per capita*, and not *per ſtirpes*. See 1 *Ld. Raym.* 496. 2. *Blac. Com.* 517.

If there be no children, or lineal deſcendants of children, one moiety or half ſhall go to the widow, and the reſidue to the neareſt of kin to the deceaſed, and their repreſentatives.

If there be no wife, then the whole ſhall be diſtributed amongſt the children, and their repreſentatives.

But it is here to be obſerved that by ſtat. 22 and 23d. *Car.* 2. c. 10. If any child other than the heir at law, who ſhall have been portioned or otherwiſe provided for by his father during his life time, to an amount equal to the diſtributive ſhare of the other children, he ſhall be excepted from this diſtribution, and that if he ſhall have been in part provided for, he ſhall have only ſo much of the diſtributive ſhare, as ſhall make his portion equal to the reſt. But the heir at law, being excepted out of the ſtatute, will have an equal diſtributive part of the perſo-

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nal eſtate of the deceaſed, notwithſtanding any land he may take by deſcent or otherwiſe.

If there be neither wife nor children living, nor repreſentatives of children deceaſed, the whole is to be given to the father of the deceaſed.

If he have no father living, the whole ſhall go to the mother, and brothers and ſiſters of the deceaſed, in equal proportions, and the repreſentatives of the deceaſed brothers and ſiſters.

If there be neither of theſe, the whole to the mother.

If there be brothers and ſiſters, or children of ſuch, but no mother, the whole to ſuch brothers and ſiſters, or their children.

If there be neither of the before-mentioned kindred of the deceaſed living, then the whole ſhall go to his grandfather or grandmother.

After theſe, uncles and aunts, together with the nephews and nieces of the deceaſed, are admitted in equal proportions.

In failure of all the above, then the whole to the next neareſt a-kin of the deceaſed who ſhall be living. 2 *Blac. Com.* 514.

In which diſtribution, it is to be remembered, no diſtinction is made between the whole and the half-blood of the deceaſed. And the next of kin mentioned in the ſtatute, are to be aſcertained according to the computation of the civil law, including the relations both on the paternal and maternal ſide. And when relations are thus found, who are diſtant from the inteſtate by an equal number of degrees, they will ſhare the perſonal property equally, although they be relations of very different denominations, as where the next of kin are great uncles or aunts, firſt conſins and great nephews or nieces, theſe being all related to the inteſtate in the fourth degree, will be entitled to an equal ſhare of his eſtate. See 2 *Blac. Com.* 316. n. 23. To which rule there is but one exception, which is where the neareſt relations are a grandfather or grandmother, and brothers or ſiſters, though all related to the inteſtate in the ſame degree, the brothers or ſiſters take the whole in excluſion of the grandfather or grandmother. 3 *Atk.* 762.

Cuſtoms of *London* and *York.*

The reader is to be apprized, that the ſtatute of diſtributions before taken notice of, expreſsly excepts the cuſtoms of the city of London, and of the province of York. It will be proper therefore, for the information of perſons

residing within the jurisdictions of those places to explain the particular mode of distribution which is established by the customs of these districts respectively: and first of

Custom of London.

The custom of the city of London, relative to the distribution of intestate effects. This custom extends to all those who are free of the city, wherever they may have died, or wherever their effects may be situated: and is as follows;

After discharging the funeral expences of the deceased, and payment of his debts, (in which no priority is observed, debts of every description being deemed of *equal degree*, 5 *Co.* 83.) and after deducting what is called the widow's chamber, that is the apparel and bed-room furniture of the wife, the residue of his goods and chattels are to be distributed thus:

If there be a widow and a child, or children; it is to be divided into 3 parts:—one third of which is allotted to the widow, another third to the children, and the remaining third part (by the statute of 1 *Jac.* 1. c. 17.) to the administrator, to be divided amongst the next of kin, according to the aforesaid statute of distributions. 2 *Salk.* 426.

If there be children only without a widow; such children shall by the custom have one moiety, and the administrator the other. 1 *Peere Wms.* 341.

If there be a widow but no children;—three fourths of the intestate's effects shall go the widow (two fourths by the custom, and one by the statute) and the remaining fourth to the next of kin. 2 *Black. Com.* 518. But see *Post.* 11 *Geo.* 1. c. 18.

But if the wife be provided for by jointure before marriage, she shall be barred of her *customary* part; but she is notwithstanding entitled to her share by the statute, unless by express agreement. 1 *Vern.* 15. 2 *Ibid.* 665.

And if children are advanced with a sum less than their proportionable part during the father's life, they must bring into hotchpot with their brothers and sisters, but not with their mother, the money they have received, before they are entitled to their customary share. 1 *Eq. Ca. Ab.* 155. 2 *Peere Will.* 526. But if they have been fully advanced they have no further dividend. *Ibid.*

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The cuſtom extends only to wife and children; if therefore there be neither of thoſe, his effects are to be diſtributed acccording to the ſtatute of diſtributions. 1 *Jac.* 2. c. 17. See 2 *Show.* 175.

And it is to be obſerved that that part, and that only, which, in caſe the deceaſed die *inteſtate*, is mentioned to go to the adminiſtrator, *can by the cuſtom*, even if he *make a will*, be diſpoſed of at his pleaſure. But now (by ſtat. 11 *Geo.* 1. c. 17.) it is provided that any freeman of London, who ſhall be married and not have iſſue by any former marriage, may give, deviſe, will and diſpoſe of his and their perſonal eſtate and eſtates, to ſuch perſon and perſons, and to ſuch uſe and uſes, as he or they ſhall think fit.

It is further to be remarked that the cuſtom of London extends only to the *perſonal* property of the deceaſed, citizens of London at the time of the origin of this cuſtom, not having regarded real eſtates, but employing all their fortunes in trade and commerce. 1. *Eq. Ca. Abr.* 150. 2 *Vez.* 593.

Nor are terms for years attending the inheritance within the cuſtom. 1 *Vern.* 104. but yet is a mortgage in fee. 1 *Ch. Ca.* 285.

It was formerly doubted whether the will of the citizen could in any way operate upon the widows or the orphanage part; but, it ſeems now to be ſettled that in reſpect to the widow, the huſband cannot by any means deprive her of her cuſtomary ſhare; yet, that ſhe may before marriage agree to accept a jointure in lieu of it, which will free it from the cuſtom. 2 *Freem.* 67. 1 *Eq. Ca. Abr.* 157. 158. 3 *Peere Wms.* 15. 321. 1 *Atk*, 63. 399. And in reſpect to the children, the father cannot deviſe either their orphanage part or the benefit of ſurvivorſhip between them, but he may bequeath them legacies inconſiſtent with the diſtribution under the cuſtom, which will put them to elect, whether they will abide by the will or take under the cuſtom. *For.* 130.

Province of York.

As to the cuſtom of the province of York, it differs from that of London only in two material points, (excluſive of the privileges given to the city of London, by the laſt mentioned ſtatute).

In the province of York, the heir at common law inheriting any lands, either in fee or in tail, is excluded from any portion of the perſonal eſtate, which he is not by the cuſtom of London. 1 *Vern.* 216.

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And in the province of York, the child's ſhare is fully veſted in him immediately on the death of his father, and in caſe of his death, will go to his repreſentatives; whereas, by the cuſtom of London, it does not veſt in him until he attain twenty-one years of age; if therefore he die before that age (whether married or ſingle) his part will go to his ſurviving brothers or ſiſters. 1 *Vern.* 89. 2 *ib.* 558.

It is to be underſtood, that in both places, the cuſtom ceaſes on the children's attaining twenty-one, and their parts will then be diſtributable according to the ſtatute of diſtributions. *Prec. Chan.* 537.

Theſe provincial variations excepted, Sir William Blackſtone obſerves, the cuſtoms appear to be ſubſtantially the ſame. And as a ſimilar policy formerly prevailed in every part of the Britiſh iſland, it may be fairly concluded that the whole is of Britiſh original; or that if derived from the Roman law of ſucceſſions, it muſt have been much earlier than the time of Juſtinian, from whoſe conſtitutions in many points, particularly in the advantages given to the widow, it very conſiderably differs: though it is not improbable that the reſemblances which yet remain, may be owing to the Roman uſages, in the time of Claudius Cæſar, diffuſed by Papinian, (who preſided at York, as *præfectus prætoris*), and continued by his ſucceſſors till the final departure of the Romans. See 2 *Blac. Com.* 519) and *Kemps v. Kelſey. Prec. Ch.* 594.

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## CHAP. VIII.

## OF GUARDIANS AND THEIR WARDS.

IN the firſt impreſſion of the preſent Treatiſe, the ſubject of guardianſhip of children was but ſlightly and incidentally noticed; but, in the preſent edition, we ſhall give it a diſtinct and more minute inveſtigation. In order to which we ſhall conſider,

I. The ſeveral kinds of guardians, their natures and incidents.

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II. The authority of guardians over the perſons and property of their wards.

III. The remedy of infants againſt their guardian, for abuſe of truſt.

I. *Of the ſeveral kinds of Guardians, their natures and incidents.*

The ſeveral kinds of guardians now in uſe, material to be noticed by us, are, 1. Guardians by *nature*. 2. Guardians for *nurture*. 3. Guardians in *ſoccage*, or by the *common law*. 4. Guardians by *ſtatute*, or *teſtamentary* guardians. 5. Guardians by the *cuſtom* of particular places. 6. Guardians by *election* of the infant. Each of which we ſhall treat of in the order we have here mentioned them.

Guardian by nature.

1. Of guardians by nature. Mr. *Hargrave*, whoſe minuteneſs of inveſtigation into legal topics, has ſeldom been equalled by any author of modern date, obſerves, in his learned obſervations upon *Coke's* 1 *Inſt.* that many of our books, particularly ſome of modern date, are very indiſcriminate, when they mention guardianſhip by nature. The inconvenience which muſt ariſe to the ſtudent from this inadvertency, he therefore, obligingly attempts to remove by a ſeries of valuable diſcriminations, to which we would refer ſuch of our readers as have been perplexed by the inaccuracies alluded to. (See *Co. Litt.* 88. *b. n.* 12.) and ſhall content ourſelves with preſenting the reader here, with an outline only of this ſpecies of guardianſhip. By the ſtrict language of our law, an *heir apparent* only can be the ſubject of a guardianſhip by nature: when, therefore, this ſpecies of guardianſhip is in the language of our *books* extended to children in *general*, or to any beſides an heir apparent, it is not conformable to the *legal* ſenſe of the term, but muſt be underſtood to have reference to ſome rule, independent of the *common law*; as where the father and mother are ſtiled the *natural* guardians of *all* their children, thoſe who expreſs themſelves ſo generally, muſt be underſtood to refer to that ſort of guardianſhip only, which the courſe of *nature* ſeems to point out where the *law* is ſilent.

The father, mother, and every other anceſtor of an infant, may in particular caſes be entitled to be his *guardian by nature*: the father however has the *firſt* title to ſuch guardianſhip, and the mother the *ſecond*. As to other an-

ceſtors, it is ſaid that where an infant happens to be heir apparent to two, as a grandfather by the father's ſide, and likewiſe a grandfather by the mother's ſide; he who happens firſt to have poſſeſſion of the infant's perſon, ſhall be his natural guardian. GUARDIANS.

Guardianſhip by nature, extends to the *perſon* only of the infant, and continues till the age of twenty-one years in males, and that age or marriage in females. 2 *Inſt.* 260.

We are not, however, to conclude that becauſe what our law calls guardianſhip by nature, is confined to *heirs apparent*, the parents have not a right to the cuſtody of their *other* children, for

2. Our law gives the cuſtody of children to their parents, in the guardianſhip by *nurture;* which ſpecies of guardianſhip, though it differs from that by nature in name and alſo in ſome other particulars, is founded on a like conformity to the order of nature. This ſpecies of guardianſhip occurs only when the infant is without any *other* guardian; and no one is entitled to it except the father or mother. And when the infant has neither of theſe, the ordinary uſually aſſigns ſome diſcreet perſon to take care of the infant's perſonal eſtate, and provide for his maintenance and education. 1 *Blac. Com.* 461. Guardian by nurture.

Guardianſhip by nurture extends no further than the cuſtody and government of the infant's perſon, and determines at the age of fourteen, both in males and females.

3. Next are guardians in *ſoccage*, who are alſo called guardians by the *common law*. Theſe take place only when the infant is entitled by *deſcent* to ſome eſtates in lands held in *ſoccage*, (which all lands except copyholds, now are by 12 *Car.* 2. c. 24.) and then by the common law the guardianſhip devolves to his next of kin, to whom the inheritance of ſuch lands cannot poſſibly deſcend; the law judging it improper to truſt the perſon of the infant in his hands, who may by poſſibility become heir to him, that there may be no temptation nor even ſuſpicion of temptation for him to abuſe his truſt. 1 *Blac. Com.* 461. *Co. Litt.* 87. *b. n.* (1) 12 *Mod.* 176. This guardianſhip belonging to the next of blood of the infant, ariſes by deſcent; in reſpect of which there is no diſtinction between the *whole* and the *half* blood: and if there are two or more in equal degree of kindred to the infant, he who firſt gains poſſeſſion of him ſhall be his guardian; except only where they happen to be brothers or ſiſters, or to be Guardian in ſoccage.

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the lineal anceſtors of the infant; in the former of which caſes the *eldeſt* is preferred, and in the latter the *male* anceſtor. But if the infant derives land by deſcent both *ex parte paternâ* and *ex parte maternâ*, that is to ſay, by the father's ſide and mother's ſide likewiſe, (when it may not be poſſible to find any next of kin of the infant incapable of inheriting his eſtate) the next of kin firſt getting poſſeſſion of the infant, ſhall have the cuſtody of his *perſon*; and the guardianſhip of thoſe lands which came to him *ex parte parternâ* ſhall belong to the *maternal* heir, and of thoſe which came *ex parte maternâ* to his *paternal* heir. If it ſhould happen that the perſon who according to the preceding rules, is entitled to the guardianſhip ſhould himſelf be under the cuſtody of a guardian, ſuch guardian ſhall have the cuſtody of the perſon ſo entitled, in right of his *ward*. See *Co. Lit.* 8vo. 88. *b. n.* (13.)

This ſpecies of guardianſhip being a perſonal truſt, wholly for the infant's benefit, is neither tranſmiſſible by deſcent, grant, nor deviſe: if therefore the guardian in ſoccage die or become incapable of performing his truſt, the guardianſhip devolves on the next neareſt of kin to the infant. *Co. Lit.* 88. *b. n.* 13. But yet where a woman is guardian in ſoccage, and marry, her huſband will in her right become the infant's guardian. *Plow.* 294. *Co. Lit.* 89. *a.*

Though this ſpecies of guardianſhip is deſcribed to lie in *tenure*, viz. it can ariſe only where the infant has lands or other hereditaments, lying *in tenure*, holden by ſoccage; yet the authority of the guardian, when appointed, extends not only to the *perſon* and the *ſoccage* lands of the infant, but alſo to all other his hereditaments, though *not lying in tenure*, and even to his copyhold eſtates (unleſs by ſpecial cuſtom the lord has right of appointing a guardian of them). But whether the guardian in ſoccage is entitled to the cuſtody of the *perſonal* eſtate of the infant, does not appear to be determined by any expreſs authority. Mr. *Hargrave*, however, on the idea which he profeſſes himſelf to entertain that the cuſtody of the infant's perſon draws after it the cuſtody of every ſpecies of property for which the law has not otherwiſe provided, "is inclined to think that *perſonality* is included within the ſcope of the guardian's authority, unleſs where by the cuſtom of a particular place, it happens to be liable to a different cuſtody." See *Co. Lit.* 88. *b. n.* 13.

The guardianſhip ends according to ſome (ſee 1 *Com.* 42. 3 *Bac. Abr.* 489) upon the infant's attaining the age of four-

teen, whether male or female, (unleſs the female marry, in which caſe her wardſhip ceaſes. 2 *Inſt.* 260.) though others underſtand this rule to extend to thoſe caſes only where another guardian, either by the election of the infant, or otherwiſe, is ready to ſucceed; and that if no other guardian be choſen or appointed ſooner, it will continue till twenty one. See *Andr.* 313. But though the heir at the age of fourteen may chooſe his own guardian, (who ſhall continue till twenty-one) and thus diſplace the guardian in ſoccage, yet both guardians will be of the ſame nature, and have the ſame office and employment aſſigned to them by the law without any intervention or direction of the infant himſelf; "for they were therefore appointed becauſe the infant in regard of his minority was ſuppoſed incapable of managing himſelf and his eſtate, and conſequently they derive their authority not from the infant but from the law." 3 *Bac. Abr.* 8vo. 403. GUARDIANS.

Guardianſhip in ſoccage, however, both as to the perſon and lands of the infant, may determine by the appointment of

4. Guardians by *ſtatute*, or as they are uſually ſtiled, *teſtamentary guardians*. The power of a father to appoint a guardian to his children, firſt aroſe on the conſtruction of ſtat. 4 and 5. *Phil.* and *Mar. c.* 8. by which he was allowed the privilege of aſſigning a guardian, either by deed or *will*, to any *woman child* under the age of ſixteen; but by a later ſtat. 12 *Car.* 2. *c.* 24. it is expreſsly enacted, that in caſe any perſon ſhall at the time of his death, have any child or children under the age of twenty-one years, and unmarried, it ſhall be lawful for the father of ſuch child or children, (whether ſuch child or children be born or be *in ventre ſa mere*, or whether ſuch father be of full age or not) by deed executed in his life time, or by his *laſt will*, executed in the preſence of *two or more* credible witneſſes, to diſpoſe of the cuſtody and tuition of ſuch child or children, in ſuch manner as he ſhall think fit, during ſuch time as ſuch child or children reſpectively ſhall continue under the age of twenty-one years, (or any leſs time) to any perſon or perſons in poſſeſſion or remainder, that he ſhall think proper, (other than popiſh recuſants) who ſhall have action againſt perſons who ſhall wrongfully take away ſuch child or children, and recover damages for ſuch child and childrens uſe. And the perſon or perſons to whom the cuſtody of ſuch child or children ſhall be committed, ſhall Guardians by ſtatute or teſtamentary guardians.

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and may take for the uſe of ſuch child or children, the profits of all lands, tenements, and hereditaments of ſuch child or children: and alſo have the cuſtody, tuition, and management of the goods, chattels, and perſonal eſtate of ſuch child or children, till the age of twenty-one years, or leſs time as aforeſaid, and bring actions relative thereto.

Conſtruction of 12 Car. 2. c. 24.

Upon which ſtatute the following obſervations occur:

That as the ſtatute gives this power to the *father* only of children, it cannot be exerciſed by any other of their relations, not even by their mother. See *Vaugh.* 180. 3 *Atk.* 519. nor is ſuch guardianſhip aſſignable by the guardian to any other perſon. *Vaugh.* 179. 2 *Atk.* 15. nor does it on his death go to his executors or adminiſtrators; but if two or more guardians are appointed, and one of them die, the ſurvivor of them alone ſhall be the infant's guardian.

That this power of appointing a guardian does not extend to copyholders, at leaſt ſo far as relates to any power a guardian has over the copyhold eſtates of the infant, on account of the prejudice that might occur to the lord of the manor; and therefore the lord of the manor, or other perſon entitled by the cuſtom, will be the infant's guardian. 3 *Bac. Abr.* 408. and *Poſt.* 80.

That *natural* children are not within the ſtatute of *Car.* 2. but yet as they are held to be within that of *Phil.* and *Mar.* (*Stra.* 1162.) and are equally in juſtice entitled to their parents attention, the court of chancery is accuſtomed to adopt the nomination of the reputed father, where the perſon ſo appointed appears to be unobjectionable. See *Brow. Ch. Ca.* 583.

That a guardianſhip appointed by deed in purſuance of the ſtatute may be revoked by the teſtator's *will* to that effect, *Rep. Temp. Finch.* 323. unleſs indeed the father has covenanted in ſuch deed, that he will not revoke it. 1 *Vez.* 442.

That as the appointment of a guardian takes effect ſolely by act of parliament, the *temporal courts* are the proper judges of the validity of ſuch appointment; and that, therefore, a will made ſolely for the purpoſe of appointing a guardian need not be proved in the eccleſiaſtical court. 1 *Ventr.* 207.

That as the ſtatute does not preſcribe any particular mode of appointment, (except that the appointing inſtrument ſhall be executed in the preſence of two witneſſes)

any form of words by which the father's intention be clearly expreſſed, will be a good appointment. *Swinb. part* 3. *c.* 12. GUARDIANS.

That a guardianſhip appointed by the father, does not determine till twenty-one, (if directed by him to continue till that period) even upon the marriage of the infant, the ſtatute expreſsly ſaying *till twenty-one*. 3 *Atk.* 625.

That if no time be mentioned by the father, it ſeems the guardianſhip will end when the infant, whether male or female, attains the age of fourteen, if under that age at the father's death, that being the rule in regard to guardians in ſoccage by the common law; but if above fourteen, the appointment will be void for uncertainty. See *Co. Lit.* 88. *b* (*n.* 13.) *Vaugh.* 184.

That the power of a guardian extends not only to the cuſtody of the infant's perſon, and of lands, &c. left him by his father, but alſo of all lands and goods of the infant, though acquired by the infant himſelf, which the guardian in ſoccage has not, *Vaugh.* 186. but he cannot like guardian in ſoccage, convey the ſame, even by granting a leaſe for years thereof. 2 *Wilſ.* 129. 135.

That teſtamentary guardians are within the controlling power of the court of chancery, which will prevent their prejudicing the infant's eſtate; and appoint others in caſe of lunacy, death, &c. See 2 *Fonb. Eq.* 239. *n.* (*b*) 3 *Bac. Abr.* 407. 410. and the caſes there cited.

That though the ſtatute ſpeaks only of remedies *for* the guardian, yet the infant has the ſame remedy *againſt* his teſtamentary guardian as he had againſt guardian by ſoccage.

See farther as to teſtamentary guardians, *Bedle* and *Conſtable*, *Vaugh.* 177. and Lord *Shaftſbury's Caſe*, 2 *Peere. Wms.* 102. where the nature of this kind of guardianſhip is particularly diſcuſſed.

5. Guardians by cuſtom. By the cuſtom of *London*, the cuſtody and guardianſhip of the perſon and goods of orphans under age, and unmarried, belongs to the city, and is appointed by the court of orphans there; and the executors or adminiſtrators of perſons having the freedom of that city, are therefore required to bind themſelves to the chamberlain, to account for the goods and chattels of ſuch children; and accordingly to deliver an inventory thereof upon oath. And the children of freemen (or freewomen) will be ſubject to the cuſtom, though born out Guardian by cuſtom.

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of London. Upon which ſubject ſee further particulars, 2 *Bac. Abr.* 8vo. 248.

By the cuſtom of Kent, likewiſe, the lords of manors, upon the deaths of their tenants, have the privilege of committing the guardianſhip of the infant heir to the next of kin; but the cuſtom is now little, if at all uſed, on account of the hazard with which it is always attended to the lord, who is bound to anſwer for the due accounting of the guardian appointed by his authority. *Ibid.*

By the cuſtom of ſome manors, the lord has alſo the power of appointing guardians to the perſon and lands of copyholders under fourteen; but if no ſuch cuſtom prevails, the ſame perſon ſhall be guardian, as would be guardian of ſoccage lands by the common law, of which ſee *ante*, *p.* 75. But it is to be obſerved, that the power given to *parents* to appoint guardians to their children, by 12 *Car.* 2. does not extend to copyhold eſtates. 2 *Lutw.* 1181. 3 *Lev.* 395. *Comb.* 253. and *ante*, p. 78.

Guardian by choice of the infant.

6. One of the ſpecies of guardians we have mentioned, is that by the election of the infant himſelf; but the right in an infant to make this choice, ariſes only when he finds himſelf from a defect of the law wholly unprovided with a guardian. This may happen to be the caſe either before fourteen, when the infant has no ſuch property as attracts a guardianſhip by tenure, and his father has neglected to exerciſe his power of appointing a guardian, and there is no other; or after fourteen, when the cuſtody of the guardian by *ſoccage* terminates, and there is no one ready to ſucceed to the truſt. See *Co. Lit.* 89. *a. n.* 16. The form of this election appears to be immaterial, and it is ſometimes made before one of the judges, though it ſhould ſeem better as well on account of teſtifying greater conſiderateneſs as for the better identifying and manifeſting the perſon of the guardian, that it ſhould be made in writing, under the infant's hand and ſeal.

Theſe are all the ſpecies of guardians which it ſeems of any utility for us to notice; thoſe appointed by the courts of chancery, and the eccleſiaſtical court, in particular caſes; and the courts of juſtice, where an infant is party to a ſuit, and ſolicits for a guardian to promote and defend it; being beyond the limits of the preſent treatiſe. Some obſervations on the nature and appointment of ſuch guardians may however be found by thoſe who wiſh for information concerning them in Mr. *Hargrave's Annot. Co. Lit.* 89. *a. n.* 16. 3 *Bac. Abr.* 8vo. 410.

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## II. *Of the Authority of a Guardian in reſpect to the Perſon and Property of his Ward.*

The ſame policy by which the law has appointed guardians of infants, has inveſted them with ſuch an authority and intereſt over their property as may be conducive to the infant's benefit.

A guardian in *ſoccage* may therefore make leaſes for years of the infant's eſtate during his minority; and even if ſuch leaſes extend beyond the term of his minority, they are not abſolutely void by his attaining his full age, but only voidable by him at his option: if therefore, he accept rent of the leſſee, or do any other act, ſhewing his acquieſcence in the leaſe, it will become valid and unavoidable. *Lit. ſ.* 123, 124. *Co. Lit.* 88, 89. *Cro. Jac.* 55. 98.

And the like may be ſaid of all other lawful acts done by the guardian during the infant's minority, they not being derived ſolely out of the *intereſt* of the guardian, but take effect by virtue of his *authority* likewiſe, which, for the time, is general and abſolute: for which reaſon all lawful acts done during the continuance of that authority, are good, and may ſubſiſt after the authority by which they were done has determined. (*a*) *Ibid.* and 3 *Bac. Abr.* 414.

And as they derive their authority from the *law*, and not from the infant, they may, and uſually do, tranſact all the affairs of the infant in their own name, and not in the name of the infant, as they would be obliged to do were their authority derived from him. *Vaugh.* 18.

But this does not hold in reſpect of *teſtamentary* guardians, for the authority of theſe is not derived from the *law*, but the will of the teſtator; they therefore have no

(*a*) But if a woman, guardian in ſoccage, marries, and her huſband and ſhe join in a leaſe of the infant's lands, this leaſe will be void on her huſband's death; for the intereſt ſhe had in the lands being in right of the *infant*, ſhe will not be bound as ſhe ſhall by thoſe acts in which ſhe joins with her huſband in parting with her *own* poſſeſſions. *Plow.* 293.

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other power over the infant's eſtate, than to preſerve it in ſafe cuſtody, unleſs the teſtator has expreſsly given them greater powers. 2 *Wilſ.* 125. 139.

Nor can a guardian for *nurture* make leaſes for years of the infant's eſtate, either in his own name or the infant's; for he has only the care of the perſon and education of the infant, and nothing to do with his eſtate. 3 *Bac. Abr.* 414.

A guardian in ſoccage may likewiſe (where the cuſtom of the manor allows of ſuch guardian) grant copyhold eſtates of the infant, and ſuch grants ſhall bind the heir; and he may alſo hold courts, and all in his own name, for he is for the time, complete lord, as the infant would have been if of age; only that he is bound to account for the profits. *Cro. Jac.* 55. 99. *Poph.* 127. *Owen.* 115. *Godb.* 145. and it has alſo been reſolved, that he may grant copyholds in reverſion, (according to the cuſtom of the manor) and ſuch grants will be good though they come into poſſeſſion during the nonage of the infant, 3 *Bac. Abr.* 415.

He may alſo make partition in behalf of an infant, and if equal, it will bind him. 2 *Roll. Abr.* 256.

This authority and intereſt of a guardian, it is however to be remembered, are confined to ſuch acts as are apparently for the infant's benefit; the advantage of the infant being the very reaſon and groundwork of the appointment of a guardian.

A guardian cannot therefore (unleſs it be manifeſtly for the ward's benefit) change the nature of the infant's eſtate. *Amb.* 370. As where the guardian or committee of a lunatic inveſted part of the lunatic's perſonal property in the purchaſe of real eſtates, it was holden that he had exceeded his power by endeavouring to defeat the next of kin in favour of the heirs at law. 2 *Vern.* 192, 193.

And where a guardian, out of the rents and profits of the infant's eſtate paid off bond debts, and the infant died, the guardian (who was mother and adminiſtratrix of the infant) was not allowed to recover the money of the heir, ſhe not having been obliged to pay off thoſe debts. *Ibid.* 606.

But where an eſtate deſcends to an infant, ſubject to incumbrances, the guardian may, and ought to apply the profits to keep down the intereſt. 2 *Peer Wms.* 278. as he may alſo to pay off a mortgage-judgment, or any other direct and immediate charge upon the land. 1 *Abr. Eq.*

261. 2 *Chan. Ca.* 197. 1 *Vern.* 436. but no other real incumbrance. 1 *Abr. Eq.* 261. GUARDIANS.

A guardian has nothing to do with any concerns of an infant, of which he cannot give an account, therefore he cannot preſent to a benefice in right of the heir, for he cannot make a profit of it to bring to account; and it is alſo ſettled, that an infant of any age, may himſelf preſent to a benefice. 2 *Eq. Ca. Abr.* 518. "but though there is no doubt about the legal right of an infant of the moſt tender age to preſent, it ſtill remains to be ſeen whether the want of diſcretion would induce a court of equity to controul the exerciſe where a preſentation is obtained from the infant without the concurrence of the guardian." *Co. Lit.* 8vo. 89. *a. n.* 1.

Nor ſhall the anſwer of a guardian to a bill in equity conclude an infant, nor be read againſt him in evidence, the effect of an infant's anſwer being only to make proper parties, and afford an opportunity of taking depoſitions. (*a*) 1 *Peer Wms.* 504. 2 *Ibid.* 387. 401. 3 *Ibid.* 237.

But an infant may appear by guardian, and ſuffer a recovery, and it will bind him; for if it be to his prejudice he may have his remedy againſt his guardian for the injury he may have ſuſtained by it. *Roll. Abr.* 731.

It may be here alſo proper to remark, that courts of equity are extremely jealous of any tranſaction entered into between guardians and wards, leſt the guardian ſhould exerciſe any undue advantages over his ward; they will not therefore give validity to any contract between them, unleſs the terms are indubitably fair and equal, nor even allow any gift or releaſe from a ward to his guardian on his coming of age. 1 *P. Wms.* 118. 2 *Vez.* 547.

### III. *Of the Remedy a Ward has againſt his Guardian for abuſe of truſt.*

By the common law, and alſo the ſtat. *Weſtm.* 2. remedies are provided for infants againſt their guardians on account of waſte done to their eſtates, by or through the

(*a*) But it is otherwiſe if a ſuperannuated defendant put in his anſwer by guardian, for he is ſuppoſed to get worſe and worſe, and ſhould not therefore have a day to ſhew cauſe. 1 *Abr. Ca. Eq.* 281.

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permiſſion of their guardians. See that ſtat. *c.* 5. *ſ.* 23. *Co. Lit.* 87. 2 *Inſt.* 305. But the moſt uſual mode of redreſs in all caſes, is by application to the court of chancery, to which the power of inveſtigating and controuling the appointment and acts of guardians is now, from whatever origin, univerſally admitted to belong; "hence it is every day's practice we find for the court to determine as to the right of guardianſhip; who is the next of kin, and who the proper guardian; to make orders on petition or motion for the proviſion of infants during any diſpute in thoſe points; to remove guardians, or compel them to give ſecurity; and to prevent their committing, and to puniſh them for abuſes committed upon the perſon or property of their wards; all ſuch wrongs and injuries being reckoned a contempt of that court, which has by an eſtabliſhed juriſdiction the protection of all perſons under natural diſabilities." 3 *Bac. Abr.* 8vo. 410. and ſee 2 *Chan. Ca.* 237. 1 *Vez.* 160. 1 *P. Wms.* 702. 2 *Ibid,* 110. (*note,*) 117. 561. *Amb.* 302. 2 *Brow. Ch. Ca.* 499. 4 *Ibid.* 101.

And this application may be made by the infant himſelf upon his attaining his age of twenty-one, or by his *prochein amy*, or next friend, during his minority. 2 *Vern.* 342. 1 *P. Wms.* 119. 3 *Atk.* 625. and this court will even in ſome caſes permit a ſtranger to the infant to come in and complain of the guardian's abuſe of the infant's eſtate. See 2 *Vez.* 484.

But when made to account by the infant, or others, he ſhall not be anſwerable for any loſs which may happen to the infant's eſtate, other than by his wilful default or negligence; for he acts in the nature of a ſteward or bailiff for the infant, and undertakes only for his diligence and fidelity. See *Co. Lit.* 80. *a.* 8 *Co.* 84. And he ſhall likewiſe have all reaſonable expences allowed him in the execution of his truſt. *Ibid.*

And a guardian being thus bound to give an account to his ward, when he comes of age, of all that he has tranſacted on his behalf, and being anſwerable for all loſſes by his wilful default or negligence, "it has now become a practice (to prevent diſagreeable conteſts with young gentlemen) for many guardians, of large fortunes eſpecially, to indemnify themſelves, by applying to the court of chancery in the firſt inſtance, acting under its direction, and accounting annually before the officers of that court," See 1 *Blac. Com.* 463.

# ABSTRACT

## Of 36 Geo. III. Cap. 52. for repealing certain duties on legacies and ſhares of perſonal eſtates, and for granting other duties thereon, in certain caſes.

SECTION I. repeals the duties impoſed by the acts of the 20th, 23d, and 29th Geo. 3. upon paper, &c. on which any receipt, or any other diſcharge for any legacy, or ſhare of perſonal eſtate, ſhall be written, &c. as to ſuch receipts or diſcharges for which new duties ſhall be granted by this act.

Statutes 20 *Geo.* III, cap 28, 23 *Geo.* III, cap. 58. & 29 *Geo.* III, cap. 51, repealed.

II. Upon every legacy, whether *ſpecific* or *pecuniary*, or of any *other deſcription*, of the amount or value of 20l. or more, given by any will or teſtamentary inſtrument of any perſon who ſhall die after the paſſing of this act, out of the *perſonal eſtate* of the perſon ſo dying, and alſo upon the clear reſidue of the perſonal eſtate of every perſon who ſhall ſo die, whether teſtate or inteſtate, and leave perſonal eſtate of the clear value of *one hundred pounds* after deducting debts, funeral expences, and other charges, and ſpecific and pecuniary legacies, (if any) whether the title to ſuch reſidue, or to any part thereof, ſhall accrue by virtue of any teſtamentary diſpoſition, or upon inteſtacy, there ſhall be paid the ſeveral duties, after the rates and in manner following:

New duties impoſed.

Where the legacy or reſidue, or part of the reſidue, ſhall be given or ſhall paſs to or for the benefit of a *brother* or *ſiſter* of the *deceaſed*, or any deſcendant of a brother or ſiſter, there ſhall be charged a duty of *two pounds* for every *one hundred pounds* of the value of ſuch legacy, or reſidue or part of reſidue, and ſo after the ſame rate for any greater or leſs ſum.

Where the legacy, &c. ſhall be given or paſs to or for the benefit of a *brother* or *ſiſter* of a *father* or *mother* of the deceaſed, or any deſcendant of ſuch brother or ſiſter, there ſhall be charged *three* pounds for *every one hundred* pounds in value, and ſo after the ſame rate for any greater or leſs ſum:

Where ſuch legacy, &c. ſhall be given, or ſhall paſs to or for the benefit of a *brother* or *ſiſter* of a *grandfather* or *grandmother* of the deceaſed, or any deſcendant of ſuch brother or ſiſter, *four pounds* for every *one hundred* pounds of the value of ſuch legacy.

And where any ſuch legacy, &c. ſhall be given or ſhall paſs to or for the benefit of any perſon in any *other degree* of *col-*

*lateral* conſanguinity to the deceaſed than is herein-before deſcribed, *or any ſtranger in blood* to the deceaſed, there ſhall be charged a duty of *ſix pounds* for every *one hundred pounds* of the value of ſuch legacy, &c. and ſo after the ſame rate for any greater or leſs ſum;

Duties not to extend to the huſbands or wives of the deceaſed.

Provided, that nothing herein contained ſhall extend to charge with any duty any legacy, or any reſidue or part of reſidue, of any perſonal eſtate, which ſhall be given or paſs to or for the benefit of the *huſband* or *wife* of the deceaſed, or to or for the benefit of any of the *royal family*.

Duties to be under management of commiſſioners for Stamps.

III. The ſaid duties ſhall be under the care, management, and direction of the commiſſioners for the time being appointed to manage the duties on ſtamped vellum, parchment, and paper.

IV. The ſaid commiſſioners ſhall, by writing under their hands and ſeals, appoint receivers of the duties, and keep accounts, ſhewing the perſonal eſtates in reſpect of which the duties have been paid.

V. Commiſſioners may provide printed receipts, which may be uſed, or others of the like forms.

Duties to be paid by executors or adminiſtrators on retaining or paying legacies.

VI. Theſe duties, wherever it is not hereby otherwiſe provided, ſhall be accounted for, anſwered and paid, by the perſon or perſons, having or taking the burthen of the execution of the will or other teſtamentary inſtrument, or the adminiſtration of the perſonal eſtate of any perſon deceaſed, upon retainer for his, her, or their own benefit, or for the benefit of any other perſon or perſons, of any legacy, &c. or part thereof, which he, ſhe, or they ſhall be entitled to retain, either in their own right, or in the right or for the benefit of any other: and alſo upon delivery, payment or other ſatisfaction or diſcharge whatſoever, of any legacy, &c. or part thereof; and in caſe any perſon or perſons, having or taking the burthen of ſuch execution or adminiſtration as aforeſaid, ſhall retain, for their own benefit, or for the benefit of any other, any legacy, &c. or part thereof, upon which any duty ſhall be chargeable by virtue of this act, not having firſt paid ſuch duty; or ſhall deliver, pay, or otherwiſe howſoever ſatisfy or diſcharge any legacy, &c. or part thereof, upon which any duty ſhall be chargeable by virtue of this act, having received or deducted the duty ſo chargeable, then the duty, which ſhall be due and payable upon every ſuch legacy, &c. or part thereof, and which ſhall not have been duly paid and ſatisfied to his Majeſty, &c. ſhall be a debt of ſuch perſon or perſons having or taking the burthen of ſuch execution or adminiſtration as is aforeſaid, to his Majeſty, his heirs, and ſucceſſors; and in caſe any ſuch perſon or perſons ſo having or taking the burthen of ſuch adminiſtration or execution as aforeſaid, ſhall

If duty be not paid before legacies are retained or diſcharged by executors, they having deducted it, the ſame to be a debt from them to his Majeſty; and if they pay legacies without deducting the duty, it ſhall be a debt from both parties.

deliver, pay, or otherwiſe howſoever ſatisfy or diſcharge any ſuch legacy, &c. or part thereof, without having received or deducted the duties chargeable thereon, (ſuch duty not having firſt been duly paid to his Majeſty, &c.) then ſuch duty ſhall be a debt to his Majeſty, &c. both of the perſon or perſons who ſhall make ſuch delivery, payment, ſatisfaction, or diſcharge, and of the perſon or perſons to whom the ſame ſhall be made.

What ſhall be deemed legacies within the intent of act.

VII. Any gift by the will or teſtamentary inſtrument of any perſon dying after the paſſing of this act, which ſhall have effect, or be ſatisfied out of the perſonal eſtate of the perſon ſo dying, or out of any perſonal eſtate which ſuch perſon ſhall have power to diſpoſe of as he or ſhe ſhall think fit, ſhall be deemed a legacy within this act, whether the ſame be given by way of annuity or in any other form, and whether the ſame ſhall be charged only on ſuch perſonal eſtate, or charged alſo on real eſtate of the teſtator or teſtatrix who ſhall give the ſame; except ſo far as the ſame ſhall be ſatisfied out of ſuch real eſtate in a due execution of the will or teſtamentary inſtrument by which the ſame ſhall be given; and every gift which ſhall have effect as a *donatio mortis cauſa*, ſhall alſo be deemed a legacy.

The value of annuities and the duty to be calculated according to the annexed tables, and the duty paid by inſtalments, &c.

VIII. The value of any legacy given by way of annuity, whether payable annually or otherwiſe, for life or lives, or years determinable on life or lives, or for years or any other time, ſhall be calculated, and the duty chargeable thereon charged, according to the ſchedule hereunto annexed; and the duty chargeable on ſuch annuity ſhall be paid by four equal payments,—the firſt payment ſhall be made before or on completing the payment of the firſt year's annuity, the three others ſimilarly on or before the completion of the payment of the three ſucceſſive years; and the value of any ſuch annuity, if determinable upon any contingency beſides the death of any perſon or perſons, ſhall be calculated without regard to ſuch contingency: *provided always*, that if any ſuch annuity ſhall determine by the death of any perſon, before four years payment of ſuch annuity ſhall become due and payable, then the duty ſhall be payable in proportion only to ſo many payments of the ſaid annuity as actually accrued and became due and payable; and in caſe any ſuch annuity ſhall at any time determine upon any other contingency than the death of any perſon or perſons, then, all payments of duty which would otherwiſe become due after the happening of ſuch contingency, if any ſuch would become due, ſhall ceaſe, and the perſon or perſons who ſhall have paid any duties which ſhall have previouſly become due, may apply for a return of ſo much of the duties ſo paid, as will reduce the ſame to the like

Proportion of duty in caſe of the death of the annuitant.

duty as would have been payable for ſuch annuity, calculated according to the term for which the ſame ſhall have endured; which abatement the commiſſioners ſhall ſettle according to the tables in the ſchedule, and ſhall cauſe the amount thereof to be paid to the perſons entitled to the ſame, out of the monies in their hands ariſing from the duties impoſed by this act.

The value of annuities payable out of legacies, and the duty, to be calculated according to the annexed tables, and the duty to be charged on the value of ſuch legacies, after deducting ſuch annuities, &c.

IX. The value of any legacy given by way of annuity for life or lives, or for years determinable on any life or lives, or for years or any other period of time, and payable, &c. out of any other legacy or legacies, ſhall be calculated, and the duty charged thereon, in the ſame manner as is herein-before directed as to other annuities; and the duty on the legacy charged with ſuch annuity, if any duty ſhall be payable for ſuch legacy, ſhall be calculated on the value of ſuch legacy, after deducting the value of ſuch annuity; and the duty for ſuch annuity ſhall be paid by the perſons entitled to the legacy charged with ſuch annuity, by four equal payments, in like manner as the ſame would be payable according to the proviſions herein before contained, if ſuch annuity had been a direct gift to the annuitant, and ſubject to the like proviſo in caſe ſuch annuity ſhall determine before four years payment ſhall become due; and the payment which ſhall be made for ſuch duty, ſhall be retained by the perſon or perſons paying the ſame out of the firſt four years payments of ſuch annuity, if ſo many ſhall become due, or out of ſo many payments as ſhall become due, by equal portions.

Duty on legacies given to purchaſe annuities to be calculated on the ſums neceſſary to purchaſe them.

X. The duty payable upon any legacy given to purchaſe, with the perſonal eſtate, an annuity of a certain amount for life or lives, or any other term, ſhall be calculated upon the ſum neceſſary to purchaſe ſuch annuity according to the tables before mentioned, and ſhall be deducted from ſuch ſum, and paid as in the caſe of other pecuniary legacies; and the perſons paying, &c. ſuch legacy, and the perſons for whoſe benefit it ſhall be paid, &c. ſhall be diſcharged, by payment of ſuch duty calculated as aforeſaid, from all other demands in reſpect of the duty payable on ſuch legacy; and the annuity to be purchaſed for the benefit of the perſon entitled to the benefit of ſuch legacy, ſhall be reduced in proportion to the duty payable thereon, ſuch reduction to be calculated in the ſame manner as the duty ſo payable is herein-before directed to be calculated: and the purchaſe of ſuch reduced annuity, together with the payment of ſuch duty, ſhall ſatisfy and diſcharge ſuch legacy as fully as if an annuity had been purchaſed equal in amount to the annuity ſo directed to be purchaſed.

Duty on legacies whoſe value can only be aſcer-

XI. If any benefit is given by any will or teſtamentary inſtrument, in ſuch terms that the amount can only be aſcertained from time to time, by the actual application of the fund allotted

for ſuch purpoſe, or made chargeable therewith, or if the amount or value of any benefit given by any will, &c. cannot by reaſon of the form and manner of the gift, be ſo aſcertained that the duty can be charged thereon under any other of the directions herein-before contained, then ſuch duty ſhall be charged upon the ſeveral ſums of money and effects which ſhall be applied from time to time for the purpoſes directed by ſuch will, &c. as ſeparate and diſtinct legacies and ſhall be paid out of the fund applicable for ſuch purpoſes, or charged with anſwering the ſame.

tained by application of the allotted fund, to be charged on the money as applied.

XII. The duty payable on a legacy, or reſidue, &c. given to or for the benefit of, different perſons in ſucceſſion, who ſhall be chargeable with the duties hereby impoſed at one and the ſame rate, ſhall be charged upon and paid out of the legacy, &c. as in the caſe of a legacy to one perſon; but where perſons are entitled in ſucceſſion, ſome or one of whom ſhall be chargeable with no duty, or ſome of whom ſhall be chargeable with different rates of duty, ſo that one rate of duty cannot be immediately charged thereon, all perſons who, in conſequence of ſuch bequeſt, ſhall be entitled for life only, or other temporary intereſt, ſhall be chargeable with the duty in reſpect of ſuch bequeſt in the ſame manner as if the annual produce thereof had been given by way of annuity; and ſuch perſons ſhall be chargeable with the duty, and the ſame ſhall be payable when they ſhall reſpectively be entitled, and begin to receive ſuch produce, and ſhall be paid by equal portions during the aforeſaid term of four years, if they ſhall ſo long continue to receive ſuch produce; and where any other partial intereſt ſhall be given, or ſhall ariſe out of ſuch property ſo to be enjoyed in ſucceſſion, the duty on ſuch partial intereſt ſhall be charged and paid in the ſame manner as the duty herein-before directed to be charged and paid in like caſes of partial intereſts, charged on any property given otherwiſe than to different perſons in ſucceſſion; and whatever perſon or perſons ſhall become *abſolutely entitled* to any ſuch legacy, &c. ſo to be enjoyed in ſucceſſion, ſhall, when they receive the ſame, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the ſame, or ſuch part thereof as ſhall be ſo received, or of which the benefit ſhall be ſo enjoyed, in the ſame manner as if the ſame had come to ſuch perſons or perſons immediately on the death of the perſon by whom ſuch property ſhall have been given to be enjoyed, or in ſuch manner that the ſame ſhall be enjoyed in ſucceſſion.

How duty on legacies enjoyed by perſons in ſucceſſion, or having partial intereſts therein, ſhall be charged.

XIII. The duty payable on any legacy, reſidue, &c. ſo given to, or ſo to be enjoyed by different perſons in ſucceſſion, upon whom the duty ſhall be chargeable at one and the ſame rate,

By whom ſuch legacies to be paid.

ſhall be deducted and paid by the perſon or perſons having or taking the burthen of the execution of the will or teſtamentary inſtrument under which the title thereto ſhall ariſe, upon payment or other ſatisfaction, or diſcharge of every or any part of ſuch legacy or reſidue, or part of reſidue, to any truſtee or truſtees, or other perſon to whom the ſame ſhall be payable or paid in truſt or for the benefit of the perſons ſo entitled thereto in ſucceſſion; and if the ſame ſhall not be ſo paid or ſatisfied to any ſuch truſtee or truſtees, then ſuch duty ſhall be deducted and paid out of the capital of the property ſo given, upon receipt, by any of the perſons ſo entitled in ſucceſſion, of any produce of ſuch capital, or any part thereof, according to the amount of the capital of which ſuch produce ſhall be ſo received; and where the duty chargeable on any ſuch bequeſt for the benefit of different perſons in ſucceſſion, ſhall be chargeable at different rates, ſo that it cannot be paid at one and the ſame time, *then* all perſons undertaking the burthen of the execution of the will or teſtamentary inſtrument in which ſuch bequeſt ſhall be contained, ſhall be chargeable with ſuch duties in ſucceſſion, in the ſame manner as ſuch perſons would be chargeable with the like duties in caſe of immediate bequeſt; unleſs the property bequeathed ſhall have been paid or otherwiſe ſatisfied to or veſted in any truſtee as aforeſaid, in which caſe the truſtee or truſtees, or their repreſentatives, ſhall be chargeable with the duties for and in reſpect of ſuch property ſo veſted in him, her, or them reſpectively, in ſuch and the ſame manner as if he, her, or they had taken the burthen of the execution of the will, by which ſuch bequeſt ſhall have been made; and in like manner, where any partial intereſt ſhall be given, or ariſe out of any ſuch property ſo to be enjoyed in ſucceſſion, and ſuch partial intereſt ſhall be ſatisfied or paid by the perſon or perſons ſo enjoying ſuch property, ſuch perſon or perſons ſhall be chargeable with the duties for and in reſpect of ſuch partial intereſt, and ſhall retain and pay the ſame in ſuch and the ſame manner as if he, ſhe, or they had taken the burthen of the execution of the will, by which ſuch partial intereſt ſhall have been created; and in all ſuch caſes the perſon or perſons ſo chargeable with duty, ſhall be debtors to the king, in like manner, and ſhall be ſubject to the like penalties, as the perſon or perſons having or taking the burthen of the execution of ſuch will, are hereby made chargeable.

Plate, &c. while enjoyed in kind, not liable to duty till in poſſeſſion of perſons having power to diſpoſe thereof.

XIV. No duty ſhall be paid on any articles of plate, furniture, or other things not yielding any income, and given to be enjoyed in ſucceſſion, whilſt the ſame ſhall be enjoyed in kind only by any perſons not having any power of ſelling or diſpoſing thereof, ſo as to convert the ſame into money or other property yielding income; but if the ſame ſhall be actually ſold or diſ-

oſed of, or ſhall come to any perſon having power to ſell or iſpoſe thereof, or having an abſolute intereſt therein, then the ime duty ſhall be chargeable and paid thereon as if the ſame ad originally been given abſolutely, and ſhall be chargeable pon and paid by the perſon for whoſe benefit the ſame ſhall be old, or who ſhall have power to ſell, or an abſolute intereſt herein, and ſhall become the debt of ſuch perſon; but ſhall not be a charge on any perſon or perſons by reaſon of their having aſſented to ſuch bequeſt, as the perſon or perſons having or taking the burthen of the execution of the will by which ſuch bequeſt ſhall have been made.

Duty on legacies enjoyed in ſucceſſion to be charged as ſuch, whether taken under wills or by inteſtacy.

XV. Where any legacy or reſidue ſhall be ſo given by any will, that different perſons ſhall become entitled thereto in ſucceſſion, the duty ſhall be charged thereon as given to be enjoyed in ſucceſſion, whether the perſon or perſons entitled thereto ſhall take the ſame under or by virtue of ſuch will, and the diſpoſitions therein contained, or in default of ſuch diſpoſitions, and as entitled by inteſtacy.

Duty on legacies in joint tenancy to be paid in proportion to the intereſt of the parties.

XVI. Where any legacy, or reſidue or part of reſidue, ſhall be given to or for the benefit of any perſons in joint tenancy, ſome or one of whom ſhall be chargeable with any duty hereby impoſed, and ſome or one of whom ſhall not be ſo chargeable, the perſon or perſons chargeable with duty ſhall pay ſuch duty in proportion to the intereſt of ſuch perſon or perſons reſpectively in ſuch bequeſt; and if any perſon or perſons chargeable with duty, and entitled in joint tenancy as aforeſaid, ſhall become entitled by ſurvivorſhip, or by ſeverance of the joint tenancy, or any larger intereſt in the property bequeathed, than that in reſpect of which ſuch duty ſhall have been paid, then ſuch perſon or perſons ſo becoming entitled by ſurvivorſhip, or ſeverance, ſhall be charged with the ſame duty as if the property to which ſuch joint tenant or tenants ſhall ſo become entitled had been originally given to or for the benefit of ſuch perſon or perſons only.

Duty on legacies ſubject to contingencies, to be charged as for abſolute bequeſts, &c.

XVII. Where the legacy, &c. ſhall be given, ſubject to any contingency which may defeat the gift, whereupon the ſame may go over to ſome other perſon or perſons, ſuch bequeſt, (unleſs chargeable as an annuity under the proviſions herein contained) ſhall be charged with duty as an abſolute bequeſt, to the perſon or perſons taking it ſubject to ſuch contingency, ſuch duty to be paid out of the capital of the legacy, notwithſtanding, on ſuch contingency, it may go to ſome perſon not chargeable with any duty; and if on the contingency after happening, the bequeſt goes in ſuch manner that the ſame, if taken immediately after the death of the teſtator under the ſame title, would have been chargeable with a higher rate of duty than the duty ſo paid, the perſon or perſons ſo

becoming entitled thereto, ſhall pay the difference between the duty ſo paid, and ſuch higher rate of duty.

How duty on legacies ſubjected to power of appointment ſhall be charged.

XVIII. And be it further enacted, that where any legacy, or the reſidue or any part of the reſidue, of any perſonal eſtate, ſhall be ſubjected to any power of appointment to or for the benefit of any perſon or perſons ſpecially named or deſcribed as objects of ſuch power, ſuch property ſhall be charged with duty as property given to different perſons in ſucceſſion; and in ſo charging ſuch duty, not only the perſon and perſons who ſhall take previous or ſubject to ſuch power of appointment, but alſo any perſon and perſons who ſhall take under or in default of any ſuch appointment, when and as they ſhall ſo take reſpectively, ſhall, in reſpect of their ſeveral intereſts, whether previous, or ſubject to, or under, or in default of ſuch appointment, be charged with the ſame duty, and in the ſame manner, as if the ſame intereſts had been given to him, her, or them reſpectively, in and by the will or teſtamentary diſpoſition containing ſuch power, in the ſame order and courſe of ſucceſſion as ſhall take place under and by virtue of ſuch power of appointment, or in default of execution thereof, as the caſe may happen to be; and where any property ſhall be given for any limited intereſt, and a general and abſolute power of appointment ſhall alſo be given to any perſon or perſons to whom the property would not belong in default of ſuch appointment, ſuch property, upon the execution of ſuch power, ſhall be charged with the ſame duty, and in the ſame manner, as if the ſame property had been immediately given to the perſon or perſons having and executing ſuch power, after allowing any duty before paid in reſpect thereof; and where any property ſhall be given with any ſuch general power of appointment, which property in default of appointment will belong to the perſon or perſons to whom ſuch power ſhall be given, ſuch property ſhall be charged with the duty, in the ſame manner as if ſuch property had been given to ſuch perſon or perſons abſolutely in the firſt inſtance, without ſuch power of appointment.

How duty to be paid on legacies of perſonal eſtates to be applied in purchaſe of real eſtates.

XIX. Any ſum of money, or perſonal eſtate, directed to be applied in purchaſe of real eſtate, ſhall be charged with duty as perſonal eſtate, unleſs the ſame ſhall be ſo given as to be enjoyed by different perſons in ſucceſſion, and then each perſon entitled thereto in ſucceſſion ſhall pay duty for the ſame in like manner as if the ſame had not been directed to be applied in the purchaſe of real eſtate; unleſs the ſame ſhall have been actually applied in the purchaſe of real eſtate before ſuch duty accrued; but no duty ſhall accrue in reſpect thereof, after the ſame ſhall have been actually applied to the purchaſe of real eſtate, for ſo much thereof as ſhall have been ſo applied: pro-

vided, that in caſe before the ſame or ſome part thereof ſhall be actually ſo applied, any perſon or perſons ſhall become entitled to an eſtate of inheritance in poſſeſſion in the real eſtate to be purchaſed therewith, or with ſo much thereof as ſhall not have been applied in the purchaſe of real eſtate, the ſame duty which ought to be paid by ſuch perſon or perſons, if abſolutely entitled thereto as perſonal eſtate by virtue of any bequeſt thereof as ſuch, ſhall be charged on ſuch perſon or perſons, and paid out of the fund remaining to be applied in ſuch purchaſe.

Eſtates *pur autre vie.*

XX. Eſtates *pur autre vie*, applicable by law in the ſame manner as perſonal eſtates, ſhall be charged with the duties hereby impoſed as perſonal eſtates.

Money left to pay duty not chargeable as a legacy.

XXI. If any direction is given in a will for payment of the duty chargeable upon any legacy out of ſome other fund, ſo that the legacy may paſs to the perſon or perſons to whom or for whoſe benefit the ſame ſhall be given free of duty, no duty ſhall be chargeable upon the money to be applied for payment of ſuch duty, though the ſame may be deemed a legacy for the benefit of the perſon or perſons who would otherwiſe pay ſuch duty.

Mode of aſcertaining duty on property not reduced into money.

XXII. In caſe of ſpecific legacies, and where the reſidue of any perſonal eſtate ſhall conſiſt of property not reduced into money, the perſon or perſons taking the burthen of adminiſtration of ſuch effects, or the perſon or perſons by whom the duty thereon ought to be paid, may ſet a value thereon, and offer to pay the duty according to that value; or require the commiſſioners for management of the ſtamp duties to appoint a perſon to ſet ſuch value, at the expence of the perſon or perſons by whom ſuch duty ought to be paid; and the commiſſioners, if they think fit, may acquieſce in the valuation made by the perſon or perſons taking adminiſtration, &c. or by whom the duty ought to be paid, without ſuch appraiſement; but if the commiſſioners are not ſatisfied with the value ſo ſet, on which the duty ſhall be ſo offered, they may, notwithſtanding ſuch offer, appoint a perſon to appraiſe ſuch effects, and ſet the value thereon, on which value the commiſſioners ſhall aſſeſs the duty; but if the perſon or perſons by whom ſuch duty ſhall be payable, ſhall not be ſatisfied with the valuation made under the authority of the commiſſioners, ſuch perſon or perſons may cauſe ſuch valuation to be reviewed by the commiſſioners of the land tax for the time being, of the diſtrict or place where ſuch effects ſhall be, at their next meeting, after the ſaid commiſſioners for management of the ſtamp duties ſhall have aſſeſſed and required payment of ſuch duty as aforeſaid, if fourteen days ſhall have elapſed between ſuch time and the meeting of the ſaid commiſſioners of land tax, and if

Property not reduced into money.

not, then at the next ſucceeding meeting of the commiſſioners, of which appeal ſix days notice ſhall be given to the ſaid commiſſioners of ſtamp duties; and the ſaid commiſſioners of land tax may, if they think fit, appoint a perſon to appraiſe ſuch effects, and ſet a value thereon, and may hear and determine ſuch appeal, in the ſame manner as in any other appeal to them, and with the like authorities, and their judgment ſhall be final; and if the valuation made under the authority of the ſaid commiſſioners of the ſtamp duties in the caſe laſt-mentioned, ſhall not be duly appealed from within the time aforeſaid, or ſhall be affirmed upon appeal, the duty ſhall be paid according to ſuch valuation; and if any variation ſhall be made on ſuch appeal, the duty ſhall be paid according to ſuch variation; and if the duty aſſeſſed in manner aforeſaid, ſhall exceed the duty offered to and refuſed by the ſaid commiſſioners of ſtamp duties, the expence of ſuch appraiſement and other proceedings in aſſeſſing ſuch duty, ſhall be borne by the perſon or perſons by whom ſuch duty ſhall be payable; and if any diſpute ſhall ariſe between any perſon or perſons entitled to any ſuch legacy, or reſidue, or part of reſidue, and any perſon having or taking the burthen of the adminiſtration of ſuch effects, with reſpect to the value thereof, or the duty to be paid thereon, the duty ſhall be aſſeſſed by the ſaid commiſſioners of the ſtamps on reference to them by either party for that purpoſe; and if the value of any property on which ſuch duty ought to be paid be in diſpute, the commiſſioners of ſtamp duty ſhall cauſe an appraiſement to be made thereof, at the expence of the perſon or perſons by whom ſuch duty ought to be paid, in the manner herein-before directed in other caſes, and aſſeſs the duty thereon accordingly: If ſuch valuation, or the aſſeſſment of duty made thereon, is diſſatisfactory to ſuch perſon or perſons by whom the duty is to be paid, the ſame ſhall be reviewed and finally determined on by the commiſſioners of land tax, upon appeal to them within the time, and under the reſtrictions, and in the manner herein-before directed in other caſes. If ſuch valuation or aſſeſſment ſhall not be duly appealed from, or ſhall be affirmed on appeal, the duty ſhall be paid according thereto; and if any variation ſhall be made therein on ſuch appeal, the duty ſhall be made according to ſuch variation; and in caſe the effects whereon any ſuch duty ſhall be payable ſhall be at the diſtance of ten miles from *London*, then it ſhall be lawful to make the like application to ſuch perſons as ſhall be deputed for that purpoſe by the ſaid commiſſioners to act in their ſtead in ſuch caſes, within the county or diſtrict in which ſuch effects ſhall be; and ſuch perſon ſo deputed ſhall act in all reſpects, as the ſaid commiſſioners are hereby authoriſed to act, ſubject nevertheleſs to the inſtructions and controul of the ſaid commiſſioners.

XXIII. When any legacy, &c. or part thereof, whereon any duty ſhall be chargeable by this act, ſhall be ſatisfied otherwiſe than by payment of money or application of ſpecific effects for that purpoſe, or ſhall be releaſed for conſideration, or compounded for leſs than the value thereof, then the duty ſhall be charged according to the amount or value of the property taken in ſatisfaction thereof, or of the conſideration for the releaſe thereof, or compoſition for the ſame: provided always, if any legacy or bequeſt ſhall be made in ſatisfaction of any other legacy, &c. remaining unpaid, the duty ſhall not be paid on both ſubjects, although both may be chargeable with duty, but ſhall be paid on the ſubject yielding the largeſt duty.

Duty on legacies not ſatisfied in money, &c. to be paid according to the value of the ſatisfaction.

XXIV. If executors or adminiſtrators, or other perſons made chargeable with duty, ſhall offer to pay any pecuniary legacy, &c. deducting the duty payable thereon, or offer to deliver or otherwiſe diſpoſe of any ſpecific legacy, or property, to or for the benefit of the perſon or perſons entitled thereto, or to any truſtee, &c. for them, upon payment of the duty payable in reſpect thereof, and the perſon or perſons entitled to ſuch legacy, &c. or their truſtee, &c. ſhall refuſe to accept ſuch offer, and to give a proper releaſe and diſcharge for ſuch legacy, &c. then, although no actual tender ſhall be made, if any ſuit ſhall be afterwards inſtituted for ſuch legacy or effects, the court in which ſuch ſuit ſhall be inſtituted, may order all coſts, &c. to be paid by the perſon or perſons who ſhall have refuſed to accept ſuch offer.

If legatees refuſe to accept legacies, duty deducted, the court, in caſe of ſuit, may order them to pay coſts.

XXV. If ſuit be inſtituted concerning adminiſtration, the court to provide for payment of the duty.

XXVI. Provided always, that any perſon or perſons taking the burthen of execution of any will, &c. or adminiſtration, may from time to time pay, deliver, or make diſtribution of any part of any legacy, &c. on payment, from time to time, of ſuch proportions of the duty hereby impoſed, as ſhall accrue in reſpect of ſuch part of ſuch perſonal eſtate as ſhall be ſo adminiſtered.

Executors may diſcharge legacies on payment of the duty accrued.

XXVII. No perſon or perſons taking the burthen of the execution of any will or teſtamentary diſpoſition, or the adminiſtration of the perſonal eſtate, nor any truſtee or truſtees, or any other perſon or perſons hereby required to account for any duty, ſhall, after the paſſing of this act, pay, deliver, or otherwiſe diſpoſe of, or in any manner diſcharge, ſatisfy, or compound for, any legacy, &c. or any part thereof, in reſpect whereof any duty is hereby impoſed, without taking a receipt or diſcharge in writing for the ſame, expreſſing the date of the receipt or diſcharge, and the names of the teſtator, teſtatrix, or inteſtate, under whoſe will or inteſtacy the title to ſuch le-

No legacy, liable to duty, to be paid without a receipt, containing certain particulars.

gacy or part of legacy &c. ſhall accrue, and of the perſon or perſons to whom ſuch receipt or diſcharge ſhall be given, and of the perſon or perſons to whom ſuch legacy, &c. ſhall belong in caſe of inteſtacy, and the amount or value of the legacy, &c. or part thereof for which ſuch receipt ſhall be given, and alſo the amount and rate of the duty payable and allowed thereon; and no written receipt or diſcharge for any legacy, &c. or any part thereof, in reſpect whereof any duty is hereby impoſed, ſhall be received in evidence, or be available in any manner whatever, unleſs the ſame ſhall be ſtamped, as required by this act; and no evidence whatever ſhall be given of any payment, ſatisfaction, or diſcharge whatever, or of any releaſe or compoſition of ſuch legacy, &c. or any part thereof, without producing ſuch receipt or diſcharge, duly ſtamped as aforeſaid, unleſs the actual payment of the duty hereby impoſed, ſhall firſt be given in evidence: provided always, that a copy of the entry, in the books of the commiſſioners of ſtamps, of the payment of ſuch duty, ſhall be admitted as evidence thereof: provided alſo, that payment of any annuity ſhall not be deemed a payment for which ſuch ſtamped receipts ſhall be required, except the ſeveral payments which ſhall complete the payments for each of the firſt four years during which ſuch annuity ſhall be payable; and in like manner in reſpect of any legacy or bequeſt, hereby directed to be charged with duty in the ſame manner as annuities, ſhall not be deemed a payment for which ſuch ſtamped receipt ſhall be required, except the ſeveral payments which ſhall complete the payments for each of the firſt four years, in reſpect of which ſuch legacy or bequeſt ſhall be chargeable with duty as an annuity.

no receipt available unleſs duly ſtampt, &c.

Copy of entry at ſtamp office of payment of duty; evidence. Stampt receipts for annuities not required but on completing payments for each of the firſt four years.

Penalty of 10l. *per cent.* for paying or receiving legacies without ſtampt receipts.

XXVIII. Any perſon taking execution of a will or adminiſtration of effects, and any truſtee or other perſon hereby directed to account for any duty, who ſhall pay, deliver, or otherwiſe diſpoſe of, or in any way ſatisfy or diſcharge, or compound for any legacy or reſidue, or part of reſidue, to or for the benefit of any perſon or perſons entitled to ſuch legacy, &c. or any part thereof, without taking ſuch receipt or diſcharge in writing as aforeſaid, and cauſing the ſame to be ſtamped within the time hereby allowed for ſtamping the ſame, ſhall forfeit and loſe the ſum of ten pounds *per centum* on the ſum of money, or the value of the property if not money, for which ſuch receipt or diſcharge ought to have been given in purſuance of this act; and all and every perſon and perſons receiving or taking the benefit of any ſuch money, or other property, without giving a written receipt or diſcharge for the ſame, in which the duty payable in reſpect thereof ſhall be expreſſed to have been allowed or paid to the perſon or perſons to whom ſuch receipt or diſcharge ſhall be given,

and which ſhall bear date on the day of ſigning the ſame, ſhall forfeit and loſe the ſum of ten pounds *per centum* on the ſum of money, or on the value of the property, ſo received or taken.

XXIX. Receipts to be ſtampt within 21 days after date, on which an acknowledgment of the payment of the duty ſhall be written. Receipts may be ſtampt within three months after date, on payment of duty, and 10l. per cent. penalty.

XXX. Miſtakes in paying duty may be rectified, if no ſuit be inſtituted, on payment of the difference within three months and 10l. *per cent.*

XXXI. Perſons paying or receiving money contrary to this act, indemnified on diſcovering any other offenders.

XXXII. If by infancy or abſence legacies cannot be paid, the money may be paid into the bank, and laid out in 3l. *per cents.* If ſuch money be improperly paid in the court of chancery may diſpoſe thereof: If more than the proper duty has been paid, the commiſſioners for ſtamps may return the exceſs; and if leſs, on payment of the full duty, the court of chancery may order repayment to the party.

XXXIII. If it ſhall appear to the commiſſioners for ſtamps, at the end of two years after the death of any perſon, that it will require time to collect the effects, or be difficult to aſcertain the reſidue of the perſonal eſtate, the duty may be compounded for: but duty to be paid on every part of perſonal eſtates not included in the compoſition.

XXXIV. If any legacy be refunded, the duty to be repaid.

XXXV. Whenever any perſon or perſons having or taking the burthen of the execution of any will or teſtamentary inſtrument, or the adminiſtration of any perſonal eſtate as aforeſaid, ſhall be entitled to any legacy, or the reſidue, or any part of the reſidue of the perſonal eſtate of any teſtator, teſtatrix, or inteſtate, ſuch perſon ſhall be chargeable with the duty whenever he, ſhe, or they ſhall be entitled, in the due courſe of adminiſtration, to retain, to his, her, or their own uſe, any part of the ſaid eſtate, in ſatisfaction of ſuch legacy, or reſidue, or any part thereof; and every ſuch perſon, before any ſuch retainer, ſhall tranſmit to the ſaid commiſſioners of ſtamp duties, or their officers, a note containing the particulars of ſuch legacy, reſidue, or part of reſidue, intended to be retained, or the amount or value thereof, and the duty which ſuch perſon or perſons ſhall offer to pay thereon; and the ſaid commiſſioners ſhall aſſeſs the duty thereon, and on payment of the ſaid duty, the ſaid receiver general of the ſaid duty, or officer appointed to receive the ſame, ſhall, at the foot of a duplicate of the ſaid aſſeſſment give a receipt for ſuch duty; and in caſe any ſuch perſon or perſons ſhall neglect to pay ſuch duty as afore-

Executors previous to retaining their legacies to tranſmit the particulars with the duty offered to the commiſſioners of ſtamps, who ſhall charge the ſame agreeable to this act.

Penalty for neglect of payment of duty for 14 days.

ſaid within fourteen days after the ſame ought to have been paid as aforeſaid, every ſuch perſon and perſons ſhall forfeit and pay treble the value of the duty which ought to have been paid.

XXXVI. Receipts for legacies, except thoſe by wills reſpecting which the duties impoſed by the acts mentioned in the preamble are repealed, to be deemed receipts within the meaning of thoſe acts; and ſuch receipts to be given for legacies due at the time of paſſing this act, and for legacies becoming due afterwards on which no duty is hereby impoſed.

XXXVII. If adminiſtration be made void, and any duty ſhall have been improperly paid, it ſhall be repaid; but if it ought to have been paid, it ſhall be allowed in account with the rightful executor.

XXXVIII. Perſons ſwearing falſely guilty of perjury.

XXXIX. Penalty of 500l. for altering receipts.

XL. Perſons forging ſtamps, *&c.* to ſuffer death.

XLI. Receipts duty ſtampt. free from all other duties.

XLII. Powers of former acts relating to ſtamps, to extend to this act.

XLIII. Penalties ſued for within three months, ſhall go *half* to the king, and *half* (with full coſts) to the informer. Suits for penalty incurred without intention of fraud, may be ſtopt by his Majeſty's attorney general.

XLIV. Penalties not ſued for within three months ſhall belong to his Majeſty; but commiſſioners of ſtamps may reward informers.

XLV. All monies ariſing from the ſaid duties to be paid to the receiver general of ſtamp duties, and by him paid into the exchequer.

XLVI. The exchequer to ſet apart from other money, a certain proportion of the duties for ten years.

Limitation of actions.

General iſſue.

Treble coſts.

XLVII. Actions under this act ſhall be commenced within ſix calendar months after the fact committed; and the defendant or defendants, may plead the general iſſue, and give this act, and the ſpecial matter in evidence; and if the plaintiff or plaintiffs ſhall become nonſuit, or if a verdict ſhall paſs againſt the plaintiff or plaintiffs, or if upon demurrer judgment ſhall be given againſt the plaintiff or plaintiffs, the defendant or defendants ſhall recover treble coſts.

# TABLE I.

The Value of an Annuity of £100 per Annum, held on a single Life; and payable Yearly.

| Years of Age. | Values. £. | s. | d. | Years of Age. | Values. £. | s. | d. |
|---|---|---|---|---|---|---|---|
| Birth | 1,032 | 14 | — | 45 | 1,228 | 6 | — |
| 1 | 1,346 | 10 | — | 46 | 1,208 | 18 | — |
| 2 | 1,563 | 6 | — | 47 | 1,189 | — | — |
| 3 | 1.646 | 4 | — | 48 | 1,168 | 10 | — |
| 4 | 1,701 | — | — | 49 | 1,147 | 10 | — |
| 5 | 1,724 | 16 | — | 50 | 1,126 | 8 | — |
| 6 | 1,748 | 4 | — | 51 | 1,105 | 14 | — |
| 7 | 1,761 | 2 | — | 52 | 1,084 | 18 | — |
| 8 | 1,766 | 4 | — | 53 | 1,063 | 14 | — |
| 9 | 1,762 | 10 | — | 54 | 1,042 | 2 | — |
| 10 | 1,752 | 6 | — | 55 | 1,020 | 2 | — |
| 11 | 1,739 | 6 | — | 56 | 997 | 14 | — |
| 12 | 1,725 | 2 | — | 57 | 974 | 18 | — |
| 13 | 1,710 | 6 | — | 58 | 951 | 12 | — |
| 14 | 1,695 | — | — | 59 | 928 | — | — |
| 15 | 1,679 | 2 | — | 60 | 903 | 18 | — |
| 16 | 1,662 | 10 | — | 61 | 879 | 10 | — |
| 17 | 1,646 | 4 | — | 62 | 854 | 14 | — |
| 18 | 1,630 | 18 | — | 63 | 829 | 2 | — |
| 19 | 1,616 | 14 | — | 64 | 803 | — | — |
| 20 | 1,603 | 6 | — | 65 | 776 | 2 | — |
| 21 | 1,591 | 4 | — | 66 | 748 | 16 | — |
| 22 | 1,579 | 14 | — | 67 | 721 | 2 | — |
| 23 | 1,568 | — | — | 68 | 693 | — | — |
| 24 | 1,556 | — | — | 69 | 664 | 14 | — |
| 25 | 1,543 | 16 | — | 70 | 636 | 2 | — |
| 26 | 1,531 | 4 | — | 71 | 607 | 10 | — |
| 27 | 1,518 | 8 | — | 72 | 579 | — | — |
| 28 | 1,505 | 6 | — | 73 | 550 | 14 | — |
| 29 | 1,491 | 16 | — | 74 | 523 | — | — |
| 30 | 1,478 | 2 | — | 75 | 496 | 4 | — |
| 31 | 1,463 | 18 | — | 76 | 471 | — | — |
| 32 | 1,449 | 10 | — | 77 | 445 | 14 | — |
| 33 | 1,434 | 14 | — | 78 | 419 | 14 | — |
| 34 | 1,419 | 10 | — | 79 | 392 | 2 | — |
| 35 | 1,403 | 18 | — | 80 | 364 | 6 | — |
| 36 | 1,388 | — | — | 81 | 337 | 14 | — |
| 37 | 1,371 | 12 | — | 82 | 312 | 4 | — |
| 38 | 1,354 | 16 | — | 83 | 288 | 14 | — |
| 39 | 1,337 | 10 | — | 84 | 270 | 16 | — |
| 40 | 1,319 | 14 | — | 85 | 254 | 6 | — |
| 41 | 1,301 | 16 | — | 86 | 239 | 6 | — |
| 42 | 1,283 | 16 | — | 87 | 225 | 2 | — |
| 43 | 1,265 | 14 | — | 88 | 213 | 2 | — |
| 44 | 1,247 | 4 | — | 89 | 196 | 14 | — |
| | | | | 90 | 175 | 16 | — |

TABLE II. *Contains a Calculation of the value of* 100*l. per Annum held on the joint Continuance of two Lives; but as it is very long, incapable of Abridgment, and unlikely to be useful, except in a very few cases, it is here omitted.*

ſaid within fourteen days after the ſame ought to have been paid as aforeſaid, every ſuch perſon and perſons ſhall forfeit and pay treble the value of the duty which ought to have been paid.

XXXVI. Receipts for legacies, except thoſe by wills reſpecting which the duties impoſed by the acts mentioned in the preamble are repealed, to be deemed receipts within the meaning of thoſe acts; and ſuch receipts to be given for legacies due at the time of paſſing this act, and for legacies becoming due afterwards on which no duty is hereby impoſed.

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General iſſue.

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| 11 | 1,739 | 6 | — | 56 | 997 | 14 | — |
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| 17 | 1,646 | 4 | — | 62 | 854 | 14 | — |
| 18 | 1,630 | 18 | — | 63 | 829 | 2 | — |
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| 20 | 1,603 | 6 | — | 65 | 776 | 2 | — |
| 21 | 1,591 | 4 | — | 66 | 748 | 16 | — |
| 22 | 1,579 | 14 | — | 67 | 721 | 2 | — |
| 23 | 1,568 | — | — | 68 | 693 | — | — |
| 24 | 1,556 | — | — | 69 | 664 | 14 | — |
| 25 | 1,543 | 16 | — | 70 | 636 | 2 | — |
| 26 | 1,531 | 4 | — | 71 | 607 | 10 | — |
| 27 | 1,518 | 8 | — | 72 | 579 | — | — |
| 28 | 1,505 | 6 | — | 73 | 550 | 14 | — |
| 29 | 1,491 | 16 | — | 74 | 523 | — | — |
| 30 | 1,478 | 2 | — | 75 | 496 | 4 | — |
| 31 | 1,463 | 18 | — | 76 | 471 | — | — |
| 32 | 1,449 | 10 | — | 77 | 445 | 14 | — |
| 33 | 1,434 | 14 | — | 78 | 419 | 14 | — |
| 34 | 1,419 | 10 | — | 79 | 392 | 2 | — |
| 35 | 1,403 | 18 | — | 80 | 364 | 6 | — |
| 36 | 1,388 | — | — | 81 | 337 | 14 | — |
| 37 | 1,371 | 12 | — | 82 | 312 | 4 | — |
| 38 | 1,354 | 16 | — | 83 | 288 | 14 | — |
| 39 | 1,337 | 10 | — | 84 | 270 | 16 | — |
| 40 | 1,319 | 14 | — | 85 | 254 | 6 | — |
| 41 | 1,301 | 16 | — | 86 | 239 | 6 | — |
| 42 | 1,283 | 16 | — | 87 | 225 | 2 | — |
| 43 | 1,265 | 14 | — | 88 | 213 | 2 | — |
| 44 | 1,247 | 4 | — | 89 | 196 | 14 | — |
| | | | | 90 | 175 | 16 | — |

TABLE II. *Contains a Calculation of the value of* 100*l. per Annum held on the joint Continuance of two Lives; but as it is very long, incapable of Abridgment, and unlikely to be useful, except in a very few cases, it is here omitted.*

# TABLE III.

The Value of an Annuity of £100 per Annum, payable Yearly, for any Number of Years, not exceeding 90.

| Years. | Values. £. | s. | d. |
|---|---|---|---|
| 1 | 96 | 2 | — |
| 2 | 188 | 12 | — |
| 3 | 277 | 10 | — |
| 4 | 362 | 18 | — |
| 5 | 445 | 2 | — |
| 6 | 524 | 4 | — |
| 7 | 600 | 4 | — |
| 8 | 673 | 4 | — |
| 9 | 743 | 10 | — |
| 10 | 811 | — | — |
| 11 | 876 | — | — |
| 12 | 938 | 10 | — |
| 13 | 998 | 10 | — |
| 14 | 1,056 | 6 | — |
| 15 | 1,111 | 16 | — |
| 16 | 1,165 | 4 | — |
| 17 | 1,216 | 10 | — |
| 18 | 1,265 | 18 | — |
| 19 | 1,313 | 6 | — |
| 20 | 1,359 | — | — |
| 21 | 1,402 | 18 | — |
| 22 | 1,445 | 2 | — |
| 23 | 1,485 | 12 | — |
| 24 | 1,524 | 12 | — |
| 25 | 1,562 | 4 | — |
| 26 | 1,598 | 4 | — |
| 27 | 1,632 | 18 | — |
| 28 | 1,666 | 6 | — |
| 29 | 1,698 | 6 | — |
| 30 | 1,729 | 4 | — |
| 31 | 1,758 | 16 | — |
| 32 | 1,787 | 6 | — |
| 33 | 1,814 | 14 | — |
| 34 | 1,841 | 2 | — |
| 35 | 1,866 | 8 | — |
| 36 | 1,890 | 16 | — |
| 37 | 1,914 | 4 | — |
| 38 | 1,936 | 14 | — |
| 39 | 1,958 | 8 | — |
| 40 | 1,979 | 4 | — |
| 41 | 1,999 | 6 | — |
| 42 | 2,018 | 10 | — |
| 43 | 2,037 | — | — |
| 44 | 2,054 | 16 | — |
| 45 | 2,072 | — | — |
| 46 | 2,088 | 8 | — |
| 47 | 2,104 | 4 | — |
| 48 | 2,119 | 10 | — |
| 49 | 2,134 | 2 | — |
| 50 | 2,148 | 4 | — |
| 51 | 2,161 | 14 | — |
| 52 | 2,174 | 14 | — |
| 53 | 2,187 | 4 | — |
| 54 | 2,199 | 4 | — |
| 55 | 2,210 | 16 | — |
| 56 | 2,221 | 18 | — |
| 57 | 2,232 | 12 | — |
| 58 | 2,242 | 18 | — |
| 59 | 2,252 | 16 | — |
| 00 | 2,262 | 6 | — |
| 61 | 2,271 | 8 | — |
| 62 | 2,280 | 4 | — |
| 63 | 2,288 | 14 | — |
| 64 | 2,296 | 16 | — |
| 65 | 2,304 | 12 | — |
| 66 | 2,312 | 2 | — |
| 67 | 2,319 | 8 | — |
| 68 | 2,326 | 6 | — |
| 69 | 2,333 | — | — |
| 70 | 2,339 | 8 | — |
| 71 | 2,345 | 12 | — |
| 72 | 2,351 | 10 | — |
| 73 | 2,357 | 4 | — |
| 74 | 2,362 | 14 | — |
| 75 | 2,368 | — | — |
| 76 | 2,373 | 2 | — |
| 77 | 2,377 | 18 | — |
| 78 | 2,382 | 12 | — |
| 79 | 2,387 | 4 | — |
| 80 | 2,391 | 10 | — |
| 81 | 2,395 | 14 | — |
| 82 | 2,399 | 14 | — |
| 83 | 2,403 | 10 | — |
| 84 | 2,407 | 4 | — |
| 85 | 2,410 | 16 | — |
| 86 | 2,414 | 4 | — |
| 87 | 2,417 | 10 | — |
| 88 | 2,420 | 14 | — |
| 89 | 2,423 | 14 | — |
| 90 | 2,426 | 14 | — |

# APPENDIX.

No. I. *A Will of Freehold and Leaſehold Premiſes, with various Limitations for the Benefit of Wife, Children, and Grandchildren.*

IN THE NAME OF GOD, AMEN, I *Joſeph Salmy*, of the pariſh of *Saint Saints, Darking*, in the county of *Surry*, gent. do make this my laſt will and teſtament as follows, (that is to ſay) FIRST I give and deviſe all thoſe my ſeven freehold meſſuages, three ſugar-houſes, a mill-houſe, ſtore-houſe, cooperage, and appurtenances thereunto reſpectively belonging or appertaining, ſituate, ſtanding, and being near *Deptford Bridge*, in the pariſh of *Saint Paul, Deptford*, in the county of *Kent*, unto my dear wife, *Betty Salmy*, for the term of her natural life, if ſhe ſhall ſurvive me, and ſo long continue my widow; and from and immediately after her deceaſe or marrying again, I give and deviſe the ſaid freehold meſſuages and premiſes to my ſon, *Joſeph Salmy*, and my daughters, *Elizabeth*, *Mary*, and *Hannah Salmy*, during their lives, and the life of the longeſt liver of them, as joint tenants; and from and immediately after the determination of the ſaid ſeveral life eſtates, TO the uſe of *William Boom* and *John Gridiſon* hereafter mentioned, and their heirs, upon truſt, to preſerve the contingent remainders hereinafter limited, and from and immediately after the deceaſe of the ſurvivor of them the ſaid *Joſeph*, *Elizabeth*, *Mary*, and *Hannah Salmy*, I give and deviſe the ſaid freehold meſſuages and premiſes to the heirs of the body of my ſaid ſon *Joſeph*; and for default of ſuch iſſue, I give and deviſe the ſaid freehold meſſuages and premiſes to all and every the child and children of the body of my ſaid three daughters, *Elizabeth*, *Mary*, and *Hannah*, lawfully to be begotten, and to the heirs of the body of ſuch child and children, as tenants in common, and not as jointenants; and for default of ſuch iſſue, I give and deviſe the ſaid freehold meſſuages and premiſes to my brother-in-law, the ſaid *William Boom*, of *Maidſtone*, in the ſaid county of *Kent*, eſquire, his heirs and aſſigns for ever. ALSO I give and bequeath to my ſaid dear wife, *Betty Salmy*, all thoſe my leaſehold meſſuages and warehouſes, with their reſpective appurtenances, ſituate, ſtanding, and being in *Tooley-ſtreet*, in the pariſh of *Saint Saviour*, in the county of *Surry*, now held by me under a grant from *Robert* Lord *Romney*: AND alſo all that my leaſehold meſſuage or tenement, with its appurtenances, ſituate, ſtanding, and being on *Blackheath* in the ſaid county of *Kent*, now in the occupation of *John Boyle*, eſquire, as tenant to me: AND alſo all that my leaſehold eſtate, called or known by the name of *Iron Mill Farm*, ſituate at *Crayford*, in the ſaid county of *Kent*, conſiſting of a farm-houſe, barns,

Deviſe of freehold meſſuages, &c. to teſtator's wife for life, if ſhe ſo long continue a widow.

Remainder to his children;

and their iſſue.

Deviſe of leaſehold eſtate to wife for life, on like condition.

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ſtables, and other outhouſes, and about one hundred and forty-ſix acres of land, meadow, and paſture ground: AND alſo all that my leaſehold meſſuage or tenement, with its appurtenances, ſituate, ſtanding, and being at *Peckham*, in the ſaid county of *Surry*, now in the occupation of *James Common*, as tenant to me, TO HAVE AND TO HOLD, the ſaid ſeveral leaſehold meſſuages and premiſes, with their reſpective appurtenances, unto my ſaid dear wife, during the term of her natural life, if ſhe ſhall ſurvive me, and ſo long continue my widow. NEVERTHELESS I do hereby ſubject and charge all my ſaid freehold and leaſehold eſtates with a proper proviſion for clothes, maintenance, and education of my ſaid ſon and three daughters during ſuch my ſaid wife's enjoyment of the ſaid eſtates. AND I do hereby direct my ſaid wife, out of the rents and profits of the ſaid eſtates, to find, provide, and pay for ſuch clothes, maintenance, and education of my ſaid ſon and three daughters accordingly; (*viz.*) for my ſaid ſon *Joſeph*, until he ſhall attain his age of twenty-one years, and afterwards to pay him one hundred pounds a year in lieu of ſuch proviſion as aforeſaid: and for my ſaid daughters, until they ſhall reſpectively marry. AND from and immediately after the marrying again, or the deceaſe of my ſaid wife, my will is, and I do hereby give and bequeath my ſaid ſeveral leaſehold eſtates to my ſaid ſon *Joſeph*, and my ſaid daughters *Elizabeth*, *Mary*, and *Hannah*, during their natural lives, as jointenants; and after the deceaſe of the ſurvivor of them, I give and bequeath the ſaid ſeveral leaſehold eſtates to the child and children of my ſaid ſon, equally to be divided amongſt them, if more than one; and in caſe of no ſuch children then living, to all the children of my ſaid three daughters, equally to be divided; and if no ſuch iſſue, then to the ſaid *William Boome*, his executors, adminiſtrators, and aſſigns, for his and their own uſe and benefit. ALSO I give and bequeath all my plate, houſehold goods, and furniture, of what nature or kind ſoever, as well in or about my dwelling-houſe at *Deptford*, as in or about my farm-houſe at *Crayford*, unto the ſaid *William Boome*, and to *John Gridſon*, of *Baſinghall-ſtreet*, *London*, gent. their executors and adminiſtrators, upon truſt nevertheleſs, that they my ſaid truſtees do and ſhall permit and ſuffer my ſaid dear wife to have the uſe and enjoyment of ſuch plate, houſehold goods, and furniture, during her natural life, if ſhe ſhall ſo long continue my widow; and from and immediately after her marrying again or deceaſe, I do direct my ſaid truſtees to divide the ſaid plate, houſehold goods, and furniture, amongſt my ſaid ſon *Joſeph*, and daughters, *Elizabeth*, *Mary*, and *Hannah*, or ſuch of them as ſhall be then living, in ſuch manner as my ſaid truſtees ſhall think fit. AND whereas I

Subject to maintenance of children.

After deceaſe of wife to children and their iſſue.

Plate and furniture to truſtees *upon truſt*, for the benefit of his wife for life.

Remainder to his children.

have elſewhere provided for my two daughters, *Rebecca* and *Sarah*, on their reſpective marriages, I leave them nothing by this my will. ALSO I give and bequeath the ſum of fifty pounds a-piece to the ſaid *William Boome* and *John Gridiſon*, and do appoint them executors of this my laſt will and teſtament. And I do revoke all former and other wills by me at any time heretofore made.

Legacy of 50l. to each of the truſtees. Appointment of executors. Revocation of former wills.

In witneſs whereof I the ſaid *Joſeph Salmy* have to this my laſt will and teſtament, contained in three ſheets of paper, to the firſt two ſheets thereof ſet my hand, and to the laſt ſheet my hand and ſeal this twelfth day of *November*, in the year of our Lord Chriſt one thouſand ſeven hundred and ninety-three.

*Joſeph Salmy*, (Seal.)

Attestation.

Signed, ſealed, publiſhed, and declared, by the ſaid teſtator, as for and to be his laſt will and teſtament, in the preſence of us, who in his preſence, and at his requeſt, and in the preſence of each other, have hereunto ſet our names as witneſſes thereof.

*Samuel Jones*, of *Eling*, *Middleſex*.
*Iſaac Manwell*, *Timothy Nealing*. } of *Gray's Inn*, *London*.

No. II. *Will of a Widow Woman, deviſing Copyhold and Leaſehold Eſtates, Annuity, and Policy of Inſurance of Houſes, to her Niece, &c. the ſame not to be ſubject to the Controul of her Huſband.*

I *Catherine Thomſon*, late of *Carey-ſtreet*, near *Lincoln's Inn*, and now of *Sloane-ſtreet*, *Chelſea*, in the county of *Middleſex*, widow, (being of ſound and collected mind, and in good health, praiſed be God for the ſame, but mindful of the uncertainty of human life, and in order to prevent any diſpute, or doubt, ariſing after my deceaſe as to the diſpoſition of the property it has pleaſed the Almighty to bleſs me with) DO make and publiſh this my laſt will and teſtament in manner following (that is to ſay) WHEREAS I am poſſeſſed of a certain copyhold tenement or public-houſe, known by the ſign of the three *Cats*, ſituated at *Hampſtead*, in the ſaid county of *Middleſex*, and now or late in the occupation of *Benjamin Ball*, which ſaid tenement has been ſurrendered to the uſe of my will: AND WHEREAS I am alſo poſſeſſed of a leaſe or term of years in a certain other tenement or public-houſe, known by the ſign of the *Lion and Cat*, ſituated in *Carey-ſtreet* aforeſaid, now in the occupation of *Henry Hornby*, his aſſignee or under-tenants: AND WHEREAS I am alſo poſſeſſed of the moiety or half part of an annuity or clear yearly ſum of one hundred pounds, payable during the life of *Henry Scowerfield*,

Preamble.

Recital of the property the teſtatrix is poſſeſſed of.

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of *Winlop* in the county of *Denbigh* in *North Wales*; and alſo of the moiety or half part of the benefit of a policy of inſurance of the annuity granted by the office for equitable aſſurances on lives and ſurvivorſhips, in *Bridge-ſtreet, Black-friars*, which policy I believe to be in the poſſeſſion of *Sarah Moore*, widow, and relict of *Edward Moore*, late of *Somerſet-houſe*, in the *Strand*, eſq. deceaſed, who in his life-time had the other moiety or half part of the ſaid annuity: AND WHEREAS I am alſo poſſeſſed of the ſum of three hundred pounds, now in the hands of Mr. *Thomas Caters*, of *Pump Court*, in the *Temple*, gent. and for which I have the note of hand of his late father deceaſed; and of the ſum of one hundred pounds in the hands of *Mr. Charles Bennet*, huſband of my niece, hereinafter named, for which I have his note of hand; NOW as to, for, and concerning my ſaid copyhold tenement at *Hampſtead*, and my ſaid leaſehold houſe in *Carey-ſtreet*, and alſo my part and proportion of the ſaid annuity of one hundred pounds, and of the ſaid policy of inſurance thereof, I give, deviſe, and bequeath the ſame, and every of them, with their and every of their appurtenances, and all and all manner of benefit and advantage whatſoever thereunto belonging or appertaining, unto my niece *Catherine Bennet*, of *Glouceſter-ſtreet, Queen-ſquare*, in the county of *Middleſex*, (late *Catherine Fielding*, ſpinſter) to and for her own ſole and ſeparate uſe and benefit, for and during the term of her natural life, the ſame not to be ſubject to the controul or diſpoſition, or to the debts or engagements of her preſent or any future huſband; and from and immediately after the deceaſe of my ſaid niece, I give, deviſe, and bequeath the ſaid two meſſuages or tenements, and the ſaid annuity and policy of aſſurance, together with all benefit and advantage thereof, unto and amongſt all and every the child and children of my ſaid niece, which ſhall be living at the time of my death, to be made over and divided unto and amongſt him, her, and them, in ſuch ſhares and proportions, and at ſuch age and ages, time and times, as my ſaid niece, together with her preſent huſband, if living, ſhall jointly, by deed or will appoint; and if her preſent huſband be then dead, then as my ſaid niece ſhall, whether covert or ſole, by deed or will appoint; and in default of ſuch appointment, then to ſuch child or children, equally to be divided amongſt them, if more than one, ſhare and ſhare alike, to hold as tenants in common; and if there ſhall be but one child, then to ſuch only child abſolutely, the ſame to be made over to the ſaid child or children of my ſaid niece, at the age or reſpective ages of twenty-one years, if the ſame be a ſon or ſons, and at that age or marriage, which ever may firſt happen, in caſe the ſame be a daughter or daughters. And in caſe

Deviſe of ſame to her niece for life.

The ſame not to be ſubject to the controul or engagements of her huſband.

Remainder to the niece's children.

there ſhall be no child of my ſaid niece living at the time of my deceaſe, then I give, deviſe, and bequeath the ſaid tenements, annuity, and policy, unto and to the uſe of my ſaid niece, her heirs and aſſigns for ever; and as, to, for, and concerning the ſaid two ſums of three hundred pounds before mentioned, and alſo all other the money, ſecurities for money, property and effects of what nature or kind ſoever which I may be poſſeſſed of at my death, and not hereinbefore particularly mentioned, I give and bequeath the ſame, and every part thereof, after payment of my juſt debts, unto my ſaid niece abſolutely and for ever: and in caſe of the deceaſe of my ſaid niece without iſſue, during my life, I nevertheleſs deſire that my ſaid niece will out of my property aforeſaid pay unto my dear ſiſter *Mary Pennington*, unto my nephew *Henry Pennington*, and his ſiſter *Elizabeth Pennington*, the ſum of five guineas a piece, which I beg their acceptance of, as a ſmall teſtimony of the love and regard I bear them. AND WHEREAS my late huſband, *Giles Thomſon*, deceaſed, by his laſt will, gave unto *Mary Monch*, of *Cheltenham*, in the county of *Glouceſter*, an annuity of five pounds per annum, to be paid to her by me during the term of her natural life, now I do hereby order that my ſaid niece ſhall pay the ſaid annuity out of the property I have hereby given her, in ſuch manner as by the will of my ſaid late huſband is directed. And I appoint my ſaid niece ſole executrix of this my will. In witneſs whereof I have hereto ſet my name and ſeal, this tenth day of *Auguſt*, in the year of our Lord one thouſand ſeven hundred and ninety-three.

Remainder to the niece abſolutely.

Gift of legacies.

*Catherine Thomſon.* (place of ſeal.)

Signed, ſealed, publiſhed, &c.
*Suſannah Carter.*
*Charles Simons.*
*Giles Mattington.*
} of *Sloane-ſtreet*, aforeſaid.

No. III. *A Deviſe of Freehold, Copyhold, Leaſehold, and Perſonal Eſtates, to Truſtees for ſecuring an Annuity to the Teſtator's Wife.*

IN THE NAME OF GOD, AMEN, I *William Bowyer*, of *James-ſtreet, Covent Garden*, in the county of *Middleſex*, gentleman, being of ſound and diſpoſing mind and memory, do make and publiſh this my laſt will and teſtament in manner following; firſt and principally I commend my ſoul to Almighty God, and my body I deſire may be decently interred at the diſcretion of my executors hereinafter named; and as to ſuch worldly eſtate as God of his goodneſs hath beſtowed

Preamble.

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Deviſe of freehold, copyhold, leaſehold, and other perſonal eſtates to truſtees.

upon me, I give and diſpoſe thereof as follows: that is to ſay, I give and deviſe all my freehold and copyhold eſtates, whereſoever ſituated, and which copyholds have been duly ſurrendered to the uſe of my will, unto *Peter Sims*, of *Market-ſtreet*, *May Fair*, in the county of *Middleſex*, gentleman, and *Samuel Philpot*, of *Ludgate-ſtreet*, in the city of *London*, ſilver-ſmith; UPON THE TRUSTS nevertheleſs, and to the intents and purpoſes hereinafter declared of and concerning the ſame, and all my leaſehold eſtates, as well for lives as for years, together with all my perſonal eſtate, of what nature or kind ſoever, I likewiſe, give, deviſe, and bequeath unto the ſaid *Peter Sims*, and *Samuel Philpot*, and their heirs, executors, adminiſtrators, and aſſigns reſpectively (according to the nature of the ſeveral eſtates) upon the truſts nevertheleſs, and to and for the ſeveral intents and purpoſes hereinafter expreſſed and declared of and concerning the ſame, (that is to ſay) upon truſt, by and out of the rents, iſſues, dividends, intereſt, and profits of all my ſaid eſtates, to pay an annuity or yearly ſum of two hundred pounds, clear of all taxes and deductions whatſoever, into the proper hands of my dear wife, *Sarah Bowyer*, during her natural life, for her own proper uſe and benefit, in addition to all other proviſions made for her upon or previous to our intermarriage; and ſo as that the ſaid annuity, or any part thereof, ſhall not be ſubject or liable to the debts, engagements, management, controul, or diſpoſition of any future huſband; the ſaid annuity to be paid and payable by half-yearly payments on the twenty-fifth day of March and the twenty-ninth day of *September*, in every year, by even and equal proportions, the firſt payment of the ſame to begin and be made on ſuch of the ſaid days as ſhall firſt happen after my deceaſe; AND UPON FURTHER TRUST, that the ſaid *Peter Sims and Samuel Philpot* ſhall and may retain the ſum of fifty pounds each for their trouble in performing the truſts of this my will. And I do hereby conſtitute and appoint my ſaid dear wife *Sarah Bowyer*, the ſaid *Peter Sims*, and *Samuel Philpot*, executrix and executors of this my laſt will and teſtament, hereby revoking and annulling all former and other wills, by me at any time heretofore made; and my will is, and I do hereby direct that my ſaid executors and truſtees ſhall each of them be anſwerable for their own ſeparate acts and receipts reſpectively only, and not the one of them for the acts or receipts of the other of them, and that they ſhall not be accountable for any loſs which may happen in my eſtates, by the reaſon of the failure of any ſecurity or ſecurities, whereon the ſame may depend, ſo that the ſame do not happen through any negligence or default of them the ſaid truſtees, or either

Upon truſt out of the rents, &c. thereof to pay an annuity of 200 l. to teſtator's wife.

Truſtees empowered to retain 50l. a-piece for their trouble.

Appointment of executors.

Revocation of former wills.

Truſtees not to be anſwerable for the acts of each other;

Nor for accidental loſſes.

Truſtees to retain their expences.

of them; and laſtly I will and direct that my ſaid truſtees do and may retain all the coſts, charges, and expences which they or either of them may ſuſtain in and about the execution of this my will, out of the eſtates and effects hereby in them reſpectively veſted.

IN WITNESS whereof, &c.

*William Bowyer*, (place of ſeal.)

Signed, ſealed, publiſhed, &c.

*Charles Baker*,
*William Jeakes*,
*Paul Jones*, } of *James-ſtreet*, aforeſaid.

No. IV. *Deviſe of Freehold and Copyhold Eſtates to Truſtees, to be ſold, for the Benefit of the Teſtator's Children.*

I *Peter Willis*, of, &c. do make and publiſh this my laſt will and teſtament, in manner following, viz. I give and bequeath to my friends *Joſeph Nicholls* and *James Wilſon*, their heirs, executors, adminiſtrators, and aſſigns, all that my freehold meſſuage or tenement, farm, lands, and hereditaments, ſituate, lying and being in &c. with the appurtenances; and alſo all thoſe the cuſtomary or copyhold meſſuages and hereditaments, ſituate and being in, &c. of which I am ſeized, to me and my heirs at the will of the lord, by copy of court roll according to the cuſtom of the manor of *Walton*, and which I have ſurrendered to the uſe of this my will, with their and every of their appurtenances, *to hold* ſuch of the ſaid hereditaments as are freehold to the uſe of them the ſaid *Joſeph Nicholls* and *James Wilſon*, and their heirs, and *to hold* ſuch of the ſaid hereditaments as are cuſtomary or copyhold, to the uſe of them the ſaid *Joſeph Nicholls* and *James Wilſon*, and their heirs, at the will of the lord, according to the cuſtom of the ſaid manor; but both as to the ſaid freehold, and alſo the cuſtomary copyhold hereditaments, upon truſt, that they the ſaid *Joſeph Nicholls* and *James Wilſon*, or the ſurvivor of them, or the heirs, executors, or adminiſtrators of ſuch ſurvivor, do and ſhall with all convenient ſpeed after my deceaſe, ſell, diſpoſe of, and convey, all and ſingular my ſaid freehold and copyhold hereditaments and premiſes, with the appurtenances, and the inheritance thereof, either entirely and together, or in parcels by public auction or private contract, unto any perſon or perſons who ſhall be willing to become and be the purchaſer or purchaſers of the ſame hereditaments and premiſes, or any part thereof, for the moſt money that can be reaſonably had for the ſame, and do and ſhall for that purpoſe, make and execute all ſuch deeds, conveyances, ſurrenders, and aſſurances, as they the ſaid *Joſeph Nicholls* and *James Wilſon*, or the ſurvivor of them, or the heirs or aſſigns of ſuch ſurvivor ſhall think fit; and I do hereby declare my will to be, that upon payment of

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the money to ariſe from ſuch ſale or ſales, or any of them, or any part or parts thereof reſpectively, it ſhall and may be lawto and for the ſaid *Joſeph Nicholls* and *James Wilſon*, and the ſurvivor of them, and the heirs and aſſigns of ſuch ſurvivor, to give and ſign any receipt or receipts for the money to ariſe thereby, which receipt or receipts ſhall be good and ſufficient diſcharge or diſcharges to any purchaſer or purchaſers thereof, his, her, and their reſpective heirs, executors, adminiſtrators, and aſſigns, for ſo much of the ſaid purchaſe money as ſhall be therein expreſſed or acknowledged to have been received, and ſuch purchaſers, his, her, and their reſpective heirs, executors, adminiſtrators, or aſſigns, ſhall not afterwards be obliged to ſee to the application of ſuch purchaſe money, or anſwerable or accountable for any loſs, miſapplication, or non-application thereof, or any part thereof reſpectively; and my will and mind is, and I do hereby direct, that the ſaid *Joſeph Nicholls* and *James Wilſon*, and the ſurvivor of them, and the heirs, adminiſtrators and aſſigns of ſuch ſurvivor, ſhall ſtand poſſeſſed of and intereſted in the monies to ariſe by ſuch ſale or ſales reſpectively as aforeſaid, upon the ſeveral truſts, and for the ſeveral ends, intents, and purpoſes, and ſubject to, with and under the ſeveral powers, proviſoes, conditions, declarations, and agreements herein after mentioned and contained, of and concerning the ſame reſpectively, (that is to ſay) in truſt, with all convenient ſpeed, to ſell and diſpoſe of the ſaid meſſuages or tenements, and premiſes, and every of them, for the beſt price that can be got for the ſame, and divide the money ariſing thereby, and the rents and profits thereof in the mean time unto and amongſt my children, *John*, *Richard*, and *Elizabeth*, equally, ſhare and ſhare alike, and to pay my ſaid ſons their ſhares thereof, when and as they ſhall reſpectively attain the age of 21 years, and my ſaid daughter her ſhare, when ſhe ſhall attain that age, or be married, with the conſent of my father, the ſaid monies in the mean time to be placed out on ſecurity at intereſt, to and for their ſeveral uſes, benefit, and education, reſpectively; and if my ſons, or either of them ſhall happen to die before he or they ſhall have attained the age of twenty-one years, without lawful iſſue, or my ſaid daughter ſhall happen to die before ſhe ſhall have attained the ſaid age of twenty-one years, or be married with ſuch conſent as aforeſaid, then the part or ſhare of him, her, or them, ſo dying, ſhall go to and be divided amongſt the ſurvivors and ſurvivor of my children, ſhare and ſhare alike; and all the reſt, reſidue, and remainder of my goods, chattels, debts and perſonal eſtate, of what nature or kind ſoever, after payment of ſuch juſt debts as I ſhall owe at the time of my deceaſe, I give and bequeath unto my ſaid three children, to be equally divided amongſt them, ſhare and ſhare alike, to be paid to my ſaid ſons, ſeverally, as they ſhall

Deviſe of reſidue.

reſpectively attain the age of twenty-one years, and to my ſaid daughter, when ſhe ſhall have attained that age, or be married, with the conſent of my ſaid father, which ſhall firſt happen, and the intereſt and profits of each one's ſhare, in the mean time to go and be applied for the maintenance and education of my ſaid children reſpectively; and my will and meaning is, that if any or either of my ſaid children ſhall happen to die before the ſaid legacies hereby intended for them ſhall become payable as aforeſaid, then I give and bequeath the part and ſhare of him, her or them, ſo dying, to and between the ſurvivors or ſurvivor of my ſaid children, equally, ſhare and ſhare alike. Alſo I give and bequeath *(here inſert bequeſts to legatees, &c.)* In witneſs, &c.

*Peter Willis*, (L. S.)

Signed, ſealed, &c. in the preſence of
*Charles Mackey*, of, &c.
*John Bates*, of, &c.
*Timothy Danes*, of, &c.

No. V. *Will of Perſonal Property to Executors for Payment of Debts, with Powers for them to compound, &c.*

This is the laſt will and teſtament of me, *John Phipps*, of, &c. whereby I give and bequeath unto *William Jones* and *Samuel Minors*, both of, &c. eſqrs. whom I appoint executors of this my will, all my ready money, and all ſuch ſums of money as ſhall be owing to me at the time of my deceaſe, upon mortgages by ſpecialty or ſimple contract, and all and ſingular other my perſonal eſtate and effects whatſoever, and whereſoever, not herein after by me otherwiſe diſpoſed of upon truſt, that they the ſaid *William Jones* and *Samuel Minors*, or the ſurvivor of them, or the executors, adminiſtrators, or aſſigns, of ſuch ſurvivor, do and ſhall, with all convenient ſpeed after my deceaſe, call in and compel payment of all ſuch part of my perſonal eſtate as ſhall conſiſt of money owing upon ſecurities or otherwiſe, and do and ſhall ſell and diſpoſe of and convert into money ſuch part or parts thereof as ſhall not conſiſt of money; and my mind and will is, that it ſhall and may be lawful to and for the ſaid *William Jones* and *Samuel Minors*, and the ſurvivor of them, and the executors, adminiſtrators, and aſſigns, of ſuch ſurvivor, to compromiſe or compound any ſum or ſums of money owing to me at the time of my deceaſe, and to adjuſt, ſettle, and compromiſe all accounts which at the time of my deceaſe ſhall be depending between me and any other perſon or perſons whomſoever, and to give or allow ſuch reaſonable time or indulgences for the payment of the ſame reſpectively,

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and in the mean time to accept and take ſuch ſecurities or aſſurances for the payment thereof as they or he ſhall in their or his diſcretion think fit; and my will and mind is, that the ſaid *William Jones* and *Samuel Minors*, and the ſurvivor of them, and the executors, adminiſtrators, and aſſigns of ſuch ſurvivor, do and ſhall, by with and out of the money ſo raiſed by the ways and means laſt herein before mentioned, ſatisfy and diſcharge all ſuch debts as ſhall be due and owing by me to any perſon or perſons whomſoever, by ſpecialty, ſimple contract, or otherwiſe howſoever at the time of my deceaſe, and the intereſt of ſuch of the ſaid debts as ſhall carry intereſt, with full power to admit ſuch evidence of any debt or debts as to him or them ſhall ſeem ſufficient; and in the next place, do and ſhall ſatisfy and diſcharge the ſeveral legacies and bequeſts of this my will, or which I ſhall or may give or bequeath by any codicils thereto. *(Here inſert legacies and bequeſts.)*

In witneſs, &c.

*John Phipps.*

Signed, ſealed, &c. in the preſence of
*Silſon Pateman*, of, &c.
*Iſaac Barnes*, of, &c.

## No. VI. *Introductory Part of a Will, or rather Teſtamentary Appointment by a Feme Covert.*

THIS is the laſt will and teſtament, or writing in nature of the laſt will and teſtament, of me *Sarah Mount*, the wife of *John Mount*, of, &c. being or intended to be alſo an appointment made purſuant to and by force and virtue, and in exerciſe and execution of the power and authority to me for this purpoſe, given in and by certain indentures of leaſe and releaſe bearing date reſpectively, the firſt and ſecond days of *April*, 1798, the releaſe being of four parts and made or expreſſed to be made between *John Mount*, the elder, of the firſt part, the ſaid *John Mount*, my huſband, of the ſecond part, me the ſaid *Sarah Mount*, of the third part, and *William Sion*, of, &c. of the fourth part, and every other power and authority whatſoever, enabling me in this behalf, do by this writing, ſigned and ſealed by me in the preſence of three credible witneſſes, whoſe names are, or are intended to be written or endorſed hereon as witneſſes to my having ſigned and ſealed the ſame, and which writing I hereby declare to be and contain my laſt will and teſtament, limit, direct, and appoint that all that and thoſe my meſſuage and tenements, lands and hereditaments hereinafter particularly mentioned and deſcribed, that is to ſay, *(here deſcribe the eſtates)* ſhall from and immediately after my deceaſe, go, continue, and

be unto *Peter Johnſon* and *Samuel Ironſide*, both of, &c. eſqrs. and their heirs, to and for the ſeveral uſes, eſtate, intents, and purpoſes hereinafter limited, expreſſed, and declared concerning the ſame, (that is to ſay) to the uſe and behoof, &c. &c. *(as in a will.)*

No. VII. *Croſs Remainders limited between Children and Grandchildren by Will.*

IN TRUST for all and every my ſon and ſons, daughter and daughters, for and during the term of their reſpective natural lives, to be equally divided between them, if more than one, ſhare and ſhare alike, to take as tenants in common, and not as joint tenants; and if I ſhall have but one ſuch ſon or daughter, then upon truſt for ſuch only ſon or daughter during the term of his or her natural life, and after the ſeveral and reſpective deaths of ſuch ſon or ſons, daughter or daughters, then as to their ſeveral and reſpective part and parts, ſhare and ſhares, upon truſt for all and every his, her, or their child or children, their heirs and aſſigns for ever, to be equally divided among them, if more than one, ſhare and ſhare alike, as tenants in common, and not as joint tenants, and if but one ſuch child, to the uſe of ſuch only child, his or her heirs and aſſigns for ever. But in caſe any ſuch children of my ſons and daughters, being ſons, ſhall die under his or their age or ages of *twenty-one* years, or being daughters, under the age of twenty one years, and unmarried, then and in ſuch caſe upon truſt, as to the original part and ſhare, parts and ſhares, as well as concerning ſuch other part and ſhare, parts and ſhares, as by virtue of this preſent clauſe, ſhall have become veſted in and accrue unto any other of the children of my ſaid ſons or daughters, by the ſame father or mother, upon the death of any other or others of ſuch laſt mentioned children as aforeſaid, for the ſurvivors or others of ſuch children by the ſame father or mother, and their heirs and aſſigns for ever, equally to be divided between ſuch remaining and other children of my ſaid ſons and daughters, if more than one, ſhare and ſhare alike, as tenants in common, and not as joint tenants; and if there ſhall be but one remaining or other child, then upon truſt for that child and his heirs and aſſigns for ever; but in caſe all ſuch child and children by the ſame father and mother as ſhall be ſons, ſhall happen to die before their, or any of their reſpective age or ages of twenty-one years, and in caſe all and ſuch of them all as ſhall be daughters, ſhall happen to die before their or any of their reſpective age or ages of twenty-one years, or marriage, then, and in ſuch caſe, as to the original part or parts, ſhare or ſhares of the ſame child or children, by the ſame father or

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mother, as well as to ſuch other part or parts, ſhare or ſhares, as by virtue of this preſent clauſe ſhall have become veſted in or accrue unto ſuch child or children by the ſame father or mother in truſt for all and every my other ſon or ſons, daughter or daughters, and the children of ſuch ſons and daughters, in caſe any of them ſhall happen to be dead, leaving iſſue, in equal ſhares and proportions, but the child and children of the ſon and ſons, daughter and daughters who ſhall then happen to be dead, ſhall be entitled only to the ſhare which his, her, or their father or mother would have been entitled to if living, equally to be divided amongſt ſuch children, if more than one, ſhare and ſhare alike, to take as tenants in common, and not as joint tenants, and if there ſhould be but one child, then to that child; but my ſaid ſons and daughters who ſhall be then living, and the children of my ſaid ſons and daughters who ſhall then be dead, ſhall reſpectively be entitled by this my will, only to ſuch eſtate and intereſt, in ſuch accruing part or parts, ſhare or ſhares, and be liable reſpectively to the ſame contingency of ſurvivorſhip, between and amongſt my ſurviving ſon or ſons, daughter or daughters, and the children of ſuch ſons or daughters, in caſe any of them ſhall happen to be dead, leaving iſſue as aforeſaid, as is hereinbefore by me given, deviſed and directed, concerning his. her, or their original part or parts, ſhare or ſhares of my real eſtate. *Provided neverthe-leſs*, and my will is, that in caſe any or either of my ſaid ſons, or daughters, ſhall happen to die without leaving children, then, and in ſuch caſe, from aud immediately after the deceaſe of any or either of my ſaid ſons or daughters without leaving children as aforeſaid, my ſaid truſtees, and the ſurvivor of them, and the heirs of ſuch ſurvivor ſhall be ſeized of my real eſtates in truſt as to the original part and parts, ſhare and ſhares of ſuch ſons and daughter who ſhall depart this life without leaving children, as well as to ſuch other part and ſhare, parts and ſhares, as by virtue of this preſent clauſe, ſhall have become veſted in or accrued unto ſuch of the ſame ſon or ſons, daughter or daughters, upon the death of any other of my ſaid ſons and daughters, without leaving children of ſuch ſons and daughters reſpectively, in caſe any of them ſhall happen to be dead without leaving iſſue, in equal ſhares and proportions; but ſuch ſons and daughters, and the child and children of ſuch the ſaid ſons and daughters as ſhall happen to be dead, ſhall be reſpectively entitled only to ſuch ſhare of eſtate and intereſt of and in ſuch accruing part and parts, ſhare and ſhares of my ſaid real eſtate, and the ſame ſhall be liable to the like contingencies of ſurvivorſhip, to and among my ſurviving ſon and ſons, daughter and daughters, and the children of ſuch ſons and daughters in caſe any of them ſhall happen to

be dead without leaving iſſue, in manner as I have hereinbefore given, deviſed, and directed, of and concerning the original part and parts, ſhare and ſhares of ſuch ſons and daughters, and their children. *Provided alſo*, and my will is, that in caſe all my ſaid ſons and daughters ſhall happen to depart this life without any child or children of them or any of them living at his or their reſpective deaths, or there being ſuch child or children, all ſuch of them as ſhall be ſons ſhall die under the age of twenty-one years, and all ſuch of them as ſhall be daughters, ſhall die under the age of twenty one years, and unmarried, then and in ſuch caſe the part and ſhare, parts and ſhares of each of them my ſaid children ſhall be, go and remain to the uſe and behoof of my brothers *James Pilfold* and *Henry Pilfold*, their heirs and aſſigns for ever, equally to be divided between them as tenants in common and not as joint tenants.

Remainder over to brothers.

No. VIII. *Part of a Will whereby the Teſtator gives a ſum of Money to be inveſted in Stock, for the benefit of a Son and his Iſſue—the Son to have the Intereſt for Life, or till Bankruptcy—the Iſſue to be entitled afterwards.* N. B. *Settled by Mr.* Fearne.

I GIVE and bequeath unto *William Knowles*, and *Thomas Wells*, their executors, adminiſtrators, and aſſigns, the ſum of 4000l. of lawful money of Great Britain, *upon the truſts*, and to and for the intents and purpoſes hereinafter expreſſed and declared of and concerning the ſame, (that is to ſay) upon truſt that they the ſaid *William Knowles* and *Thomas Wells*, and the ſurvivor of them, his executors, adminiſtrators, and aſſigns, do and ſhall lay out and inveſt the ſame in parliamentary ſtocks or public funds, or on real or government ſecurities at intereſt, and from time to time alter, change, and vary the ſecurities as he or they ſhall think fit, and do and ſhall from time to time pay the intereſt, dividends, and produce of the ſaid ſum of 4000l. or of the ſtocks, funds, or ſecurities in which the ſame ſhall be inveſted, to my ſaid ſon *Kingſton*, and his aſſigns, or otherwiſe permit and ſuffer, and fully authoriſe and impower him and them to receive and take the ſame, until the time of his deceaſe, or of a commiſſion of bankruptcy iſſuing againſt him, whichever ſhall firſt happen; and from and after the deceaſe of my ſaid ſon, or a commiſſion of bankruptcy iſſuing againſt him, *upon this further truſt*, that they the ſaid truſtees, or the ſurvivor of them, his executors, adminiſtrators, and aſſigns, ſhall and do pay, transfer, and ſet over the ſaid principal ſum of 4000l, and all intereſt, dividends, and produce thereupon due or to become due, and the ſecurity or ſecurities

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in which the ſame ſhall be then inveſted, unto and amongſt all and every the child and children of my ſaid ſon, equally to be divided between or amongſt them, if more than one; and if but one, then the whole to ſuch one, and to belong to and be an intereſt veſted in ſuch child or children being a ſon or ſons at his or their age or reſpective ages of *twenty-one* years; or being a daughter or daughters, at her or their age or reſpective ages of twenty-one years, or day or reſpective days of marriage, which ſhall firſt happen; and to be paid, transferred and aſſigned at ſuch ages, days, or times, to ſuch child and children reſpectively, not attaining the ſaid ages, days. or times till after the deceaſe of my ſaid ſon, or after a commiſſion of bankruptcy iſſued againſt him; but the ſhare or ſhares of ſuch child or children attaining the ſaid ages, days, or times before the deceaſe of my ſaid ſon, or before a commiſſion of bankruptcy (if any) iſſued againſt him. to be paid and payable, and to be transferred to him, her, or them reſpectively, immediately after the deceaſe of my ſaid ſon, or a commiſſion of bankruptcy iſſued againſt him, whichever ſhall firſt happen, with the intereſt, dividends, or produce thereupon due or to become due from and after the times of ſuch deceaſe or commiſſion of bankruptcy, whichever ſhall firſt happen: *And upon further truſt*, that they the ſaid truſtees and the ſurvivor of them, or the executors, adminiſtrators, and aſſigns of ſuch ſurvivor, ſhall and do in the mean time, and after the deceaſe of my ſaid ſon, or a commiſſion of bankruptcy iſſued againſt him, whichever ſhall firſt happen, pay, apply, and diſpoſe of the clear yearly intereſt, dividends, and produce of the ſhare of every ſuch child whoſe ſhare ſhall not then be veſted or payable; as and when the ſame ſhall from time to time become due, and be received for the maintenance and education of ſuch child reſpectively, until his or her reſpective ſhare or ſhares ſhall become veſted or payable, if he, ſhe, or they ſhall ſo long live. *Provided always*, and it is my will, and I do hereby direct that if any ſuch child ſhall depart this life before the ſhare hereby intended or provided for him or her ſhall become veſted, then the ſhare or ſhares (as well original, as accruing by virtue of this preſent clauſe or proviſo) hereby intended and provided for every ſuch child, ſo dying, ſhall from time to time go, accrue and belong unto the ſurvivor, and others or other of the ſaid children, and ſhall be equally divided between or amongſt them, if more than one, but if but one, the whole to that one, and to become veſted and be paid and payable to him, her, or them at ſuch ages or days and times, and in the ſame manner as is or are herein-before directed, provided, and declared concerning his, her, or their original ſhares reſpectively.

No. IX. *A Bequeſt of the Reſidue of a Teſtator's Perſonal Eſtate to be laid out in the Purchaſe of Lands in truſt for the unborn Son of the Teſtator's eldeſt Son, and the heirs of his body, with remainder to the Teſtator's future Children.* (*Settled by Mr.* Fearne.)

I GIVE and bequeath all the reſt and reſidue of my monies, ſecurities for monies, ſtocks, funds, perſonal eſtate and effects whatſoever, not herein-before by me otherwiſe given and diſpoſed of, unto *James Urkins* and *Richard Villers*, their executors, adminiſtrators and aſſigns, *upon truſt* and confidence that they the ſaid *James Urkins* and *Richard Villers*, their executors, or adminiſtrators, do and ſhall as ſoon as conveniently may be after my deceaſe, and a convenient purchaſe or purchaſes be found, lay out and inveſt the ſame in the purchaſe of freehold lands or hereditaments, to be ſituated in that part of Great Britain called *England*, of a clear indefeaſible eſtate of inheritance in fees ſimple, to be conveyed and aſſured to the uſe of the truſtees or truſtee ſo purchaſing the ſame, their or his heirs and aſſigns for ever, *upon the truſts*, for the intents and purpoſes, and under, and ſubject to the proviſoes and declarations hereinafter by me expreſſed or declared concerning the ſame (that is to ſay) *in truſt* for the firſt ſon of the body of my ſon *Iſaac Iſrael*, lawfully iſſuing, and the heirs of the body of ſuch firſt ſon: and in default of ſuch iſſue in truſt for the ſecond, third, fourth, fifth, ſixth, and all and every other ſon and ſons of the body of the ſaid *Iſaac*, lawfully iſſuing, ſeverally and ſucceſſively, and in remainder one after another in order and courſe, as they reſpectively ſhall be in priority of birth, and the ſeveral and reſpective heirs of the body and bodies of all and every ſuch ſon and ſons, the elder of ſuch ſons and the heirs of his body being always preferred, and to take before the younger of ſuch ſons, and the heirs of his and their body and bodies; and *in default of ſuch iſſue* in truſt for all and every the daughter and daughters of the body of my ſaid ſon lawfully iſſuing, equally to be divided between or amongſt them, if more than one, ſhare and ſhare alike as tenants in common and not as joint tenants, and the ſeveral and reſpective heirs of the body and bodies of all and every ſuch daughter and daughters; and if there ſhall be but one ſuch daughter, then in truſt for ſuch only daughter and the heirs of her body; and in caſe there ſhall be more than one ſuch daughter and there ſhall be a failure of lawful iſſue of the body or bodies of any ſuch daughter or daughters, then as to the original part and ſhare, or parts and ſhares of any ſuch daughter or daughters whoſe iſſue ſhall ſo fail, as well as to ſuch other part and and ſhare, or parts and ſhares, as by virtue of this preſent

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clauſe ſhall have become veſted in, or have accrued unto any ſuch the ſame daughter or daughters, or her or their iſſue, upon the failure of iſſue of any other or others of the ſaid daughters, in truſt for the remaining and other or others of the ſaid daughters to be equally divided between or among them, if more than one, ſhare and ſhare alike as tenants in common and not as joint tenants, and the ſeveral and reſpective heirs of the body and bodies of ſuch remaining and other daughters; and if there ſhall be but one ſuch remaining and other daughter, then in truſt for the daughter and the heirs of her body, *(remainder to the children of ſeveral other ſons of teſtator, with remainder to the children of ſeveral of his daughters)* and in default of ſuch iſſue then *in truſt* for every *future (a)* ſon and ſons of me the ſaid *Jacob Iſrael* (the teſtator) ſeverally, ſucceſſively, and in remainder one after another in order and courſe as they ſhall reſpectively be in priority of birth, and the ſeveral and reſpective heirs of the body and bodies of all and every ſuch future ſon and ſons, the elder of ſuch ſon and ſons and the heirs of his body being always preferred and to take before the younger of ſuch ſons and the heirs of his and their body and bodies, *and in default of ſuch iſſue*, in truſt for all and every the future daughter and daughters of my body lawfully iſſuing, to be divided between or amongſt them, if more than one, ſhare and ſhare alike, as tenants in common and not as joint tenants, and the ſeveral and reſpective heirs of the body and bodies of all and every ſuch daughter and daughters; and if there ſhall be but one ſuch daughter, then in truſt for ſuch only daughter and the heirs of her body, and in caſe there ſhall be more than one ſuch daughter, and there ſhall be a failure of lawful iſſue of the body or bodies of any ſuch daughter or daughters then as to the original part and ſhare, parts and ſhares of any ſuch daughter or daughters whoſe iſſue ſhall ſo fail, as to ſuch other part and ſhare, or parts and ſhares as by virtue of this preſent clauſe ſhall have become veſted in or have accrued unto any ſuch, the ſame daughter or daughters, or her or their iſſue upon the failure of iſſue of any other or others of the ſaid daughters, in truſt for the remaining and other or others of the ſaid daughters to be equally divided between or among them if more than one, ſhare and ſhare alike, as tenants in common and not as joint tenants, and the ſeveral and reſpective heirs of the body and bodies of ſuch remaining and other daughters, and if there ſhall be but one ſuch remaining daughter, then in truſt for that one daughter and the heirs of her body; *and for want*

*(a)* See poſt. p. 117. note (*b*).

*of ſuch iſſue*, in truſt for my own right heirs for ever *(b)*. *Provided always*, and my will and mind is and I have ſo directed the land ſo to be purchaſed as aforeſaid to be conveyed and aſſured to the uſe of my ſaid truſtees or truſtee ſo purchaſing the ſame, their or his heirs, in manner aforeſaid, in order and to the end and intent that the legal eſtate and inheritance in fee ſimple thereof may be thereby veſted in ſuch truſtees or truſtee, and that they or he, their or his heirs ſhall ſtand ſeized thereof, in truſt, and for the purpoſe of ſupporting and preſerving the ſaid ſeveral future contingent limitations to the iſſue of my ſaid children reſpectively, as fully and effectually to all intents, conſtructions and purpoſes as if I had limited particular eſtates to truſtees during the lives of my ſaid children reſpectively, or otherwiſe, upon or for ſuch expreſs truſt or purpoſe, it being my intent and meaning that no perſon ſhall under the limitations and truſts aforeſaid, become entitled to the ſame lands in poſſeſſion or to the rents and profits thereof during ſuch time as any antecedent limitation remains in contingency and capable of taking effect, (that is to ſay) whilſt there is any poſſibility in the eye of the law, of any other perſon or perſons coming in eſſe, who if then in eſſe would take a prior eſtate in the ſame lands under the truſts and limitations herein-before expreſſed or contained. AND as to the intereſt, dividends, and proceed of the ſaid truſt monies and effects ſo directed to be inveſted in the purchaſe of lands as aforeſaid, and the rents, iſſues, and profits of the lands to be purchaſed therewith, which ſhall ariſe or accrue as well from the time of my deceaſe until ſome perſon or perſons ſhall become entitled thereto in poſſeſſion under the limitations aforeſaid, as during any interval which may happen from the determination of any preceding limitation, to take effect

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*(b)* As the limitation to the teſtator's right heirs is not until *default of his iſſue*, it is requiſite to limit theſe eſtates tail to his *future children* (as above p. 116.) in order to carry the eſtate to the *iſſue of ſuch children*; but, this will give ſuch *future* children themſelves of courſe tail in the premiſes, which puts them upon a much better footing than the *preſent* children, who are to have no benefit at all of the truſt premiſes; but there is no extending the benefit through failure of iſſue of the teſtator in any other manner; and it will be an eaſy matter upon the birth of any future child to add a limitation to the iſſue of ſuch child like thoſe of the iſſue of the preſent children, and for the teſtator to execute the will with ſuch additions and alterations." *C. F.*

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" *I have ſettled the above draught of the two clauſes deſired in ſuch a manner as I think will avoid all thoſe queſtions which ſo frequently ariſe upon limitations, of the nature of thoſe now deſired. The minuteſt alteration or omiſſion of any of the words of the proviſoes I have ſubjoined to the limitations might open the door to ſuch queſtions, and therefore they ſhould be carefully attended to.*"

CHARLES FEARNE.

No. X. *A Bequeſt of a Sum of Money to Truſtees to be inveſted in the Stocks, or put out at Intereſt, the Dividends, &c. to be at the ſeparate Diſpoſal of a* Feme Covert *during her Life, and on her Death the Principal to be divided amongſt her Children.*

I GIVE and bequeath the ſum of 10001. of lawful money of *Great Britain*, to the ſaid *James Hales* and *William Knowles*, their executors, adminiſtrators, and aſſigns, upon and for the truſts, intents, and purpoſes and with, under, and ſubject to the powers, proviſoes, and declarations hereinafter expreſſed, of or concerning the ſame, (that is to ſay) *upon truſt*, that they the ſaid *James Hales* and *William Knowles*, and the ſurvivor of them, and the executors, adminiſtrators, and aſſigns, of ſuch ſurvivor, do and ſhall lay out and inveſt the ſame in their or his names or name, in the purchaſe of parliamentary ſtocks or funds of *Great Britain*, or at intereſt upon real ſecurities in ſome of his majeſty's dominions in Europe or America, and do and ſhall from time to time, alter and vary the ſame at their or his diſcretion, and do and ſhall, during the life of my daughter *Ann*, the wife of *Richard Penman*, eſq. pay the intereſt, dividends, and annual produce thereof to ſuch perſons, for ſuch intents and purpoſes, and in ſuch manner as ſhe my ſaid daughter ſhall by any writing or writings, ſigned by her (whether covert or ſole) as the ſame ſhall from time to time become due and payable, but not by way of anticipation, direct or appoint, or for want of ſuch directions or appointment into her own hands, for her own ſole, ſeparate and peculiar uſe and benefit, and excluſively of and without being in anywiſe ſubject or liable to the debts, intermeddling or controul of her preſent or any future huſband, and I declare it to be my will, that the receipts in writing of my ſaid daughter, or of the perſon or perſons to whom ſhe ſhall direct the ſaid intereſt, dividends, and annual produce to be paid, ſhall, notwithſtanding her coverture, be a good and ſufficient diſcharge, and good and ſufficient diſcharges for the ſaid intereſt, dividends, and annual produce, or ſo much thereof as in ſuch receipts reſpectively ſhall be expreſſed or mentioned to be received. And from and after the deceaſe of my ſaid daughter *Ann*, *upon truſt*, that they the ſaid truſtees, and the ſurvivor of them, or the executors, adminiſtrators, or aſſigns of ſuch ſurvivor, do and ſhall pay, transfer and aſſign the ſaid ſum of 1000l. and the ſtocks, funds, and ſecurities in or upon which the ſame or any part thereof ſhall be inveſted or laid out, and the intereſt, dividends, and annual produce thereof, to, between, or among all and every, or ſuch one or more, excluſively of the other or others, of the child or children of my ſaid daughter, either by her preſent

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or any future huſband, or unto all and every, or ſuch one or more of the lawful iſſue born in the lifetime of my ſaid daughter, of any of the ſaid children, or both, unto ſuch one or more of the ſaid children, and ſuch one or more of their or any of their iſſue, born in the lifetime of my ſaid daughter, at ſuch age or ages, from fourteen incluſive to twenty-one incluſive, in ſuch manner and if more than one, in ſuch ſhares and proportions as my ſaid daughter, by any deed or deeds, or inſtrument or inſtruments in writing, to be ſealed and delivered by her in the preſence of, and atteſted by two or more credible witneſſes, or by her laſt will and teſtament, or by any codicil or codicils thereto to be ſigned and publiſhed by her in the preſence of, and atteſted by the like number of witneſſes ſhall, notwithſtanding her preſent or any future coverture, direct and appoint, and for want of ſuch directions and appointment, do and ſhall pay, transfer, and aſſign the ſaid truſt monies, ſtocks, funds, and ſecurities, and the intereſt, dividends, and annual produce thereof, to, between, or among all and every the children or child of my ſaid daughter, who being a ſon or ſons, ſhall attain the age of twenty-one years, or depart this life under that age leaving iſſue living at the time of his or their deceaſe or reſpective deceaſes or born in due time after, or being a daughter or daughters, ſhall attain that age, or marry, to be divided between or among ſuch children, if more than one, in equal ſhares and proportions, and if but one child, the whole of the truſt monies, ſtocks, funds, and ſecurities to ſuch one child; and if there be no child of my ſaid daughter *Ann*, who being a ſon, ſhall attain the age of twenty-one years, or depart this life under that age leaving iſſue of his body living at the time of his deceaſe or born in due time after, or being a daughter, ſhall attain that age, or marry, then the ſaid truſt money, ſtocks, funds, and ſecurities ſhall be conſidered as part of the ſurplus or reſidue of my perſonal eſtate, and be diſpoſed of accordingly.

No. XI. *Power enabling Deviſees to charge the deviſed Eſtate with Jointures.*

PROVIDED alſo, and it is my further will and meaning, that it ſhall and may be lawful to and for the ſaid *Andrew Thomas*, *Jeremiah Williams* and *Samuel Keate*, and each and every of them reſpectively, as, and when they reſpectively ſhall be entitled to the poſſeſſion, or the rents and profits of the ſaid manors and hereditaments hereinbefore by me deviſed, or any of them, by any deed or deeds, inſtrument or inſtruments in writing, to be ſealed and delivered by them reſpectively, in the preſence of, and atteſted by two or more credible witneſſes,

to grant, limit, ſettle, or appoint, to, or to the uſe of, or in truſt for any woman or women whom they reſpectively ſhall happen to marry; and that either before or after ſuch marriage reſpectively, for and during the natural life or lives of ſuch woman or women reſpectively, for or in the name of her or their jointure or jointures, or of part of her or their jointure or jointures, any annual ſum or yearly rent-charge not exceeding 150l. by the year, tax free, and without any deduction, to be iſſuing out of, and to be charged and chargeable upon all or any part of the ſaid manors and hereditaments whereof they ſhall then be entitled to the poſſeſſion, or to the rents and profits thereof, and alſo to annex to ſuch rent-charge reſpectively, ſuch powers and remedies for the recovering of the ſame when in arrear, and to raiſe, create and demiſe ſuch truſt, term, or term of years reſpectively, of or in the hereditaments ſo charged, and under ſuch truſt, powers and proviſions, for the better ſecuring the due payment of the ſame rent-charge or rent-charges reſpectively, from and immediately after the deceaſe of them the ſaid *Andrew Thomas*, *Jeremiah Williams*, and *Thomas Keate*, reſpectively, as are uſually annexed to rent-charges, or raiſed, created, or demiſed for ſecuring the ſame. PROVIDED NEVERTHELESS, and it is my mind and will, that my ſaid eſtates ſhall not be ſubject to the payment of more than two ſuch jointures or rent-charges at one and the ſame time; but nevertheleſs the execution of the aforeſaid jointuring power by any of the perſons to whom it is given as aforeſaid, ſhall not be prevented, prejudiced, or invalidated by reaſon of there being two or more ſuch jointures or rent-charges then ſubſiſting and charged upon the ſaid eſtates, but ſhall be good and effectual notwithſtanding the ſaid eſtates ſhall not be liable or ſubject to the payment of the jointure or rent-charge thereby limited, ſettled or appointed, ſo long as two other ſuch jointures or rent-charges as aforeſaid, prior thereto, ſhall be ſubſiſting, charged upon the ſaid eſtates or any part thereof.

XII. *Power in a Will for Truſtees to grant Leaſes for 21 Years, during the Continuance of a Truſt Term, and for the Tenants in Poſſeſſion after the Expiration thereof.*

PROVIDED ALSO, and it is my further will and meaning, that it ſhall and may be lawful to and for the ſaid ———— (the truſtees) and the ſurvivors and ſurvivor of them, and the executors and aſſigns of ſuch ſurvivor, from time to time, during the continuance of the ſaid term of 500 years, and from and after the expiration or other ſooner determination thereof, for the ſaid *Andrew Thomas*, *Jeremiah Williams*, and *Samuel Keate*, reſpectively, as and when they ſhall reſpectively be entitled to

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the poſſeſſion, or to the rents and profits of the ſaid manors and hereditaments in the ſaid county of *Wilts*, and in the kingdom of *Ireland*, by this my will, deviſed as aforeſaid, by indenture or indentures, to be ſealed and delivered by them reſpectively, in the preſence of, and atteſted by two or more credible witneſſes, to make any demiſe or leaſe, demiſes or releaſes of all or any part of the ſaid hereditaments and premiſes in the ſaid county of *Wiltſhire*, and in the kingdom of *Ireland*, whereof they ſhall reſpectively be entitled to the poſſeſſion, or to the rents and profits thereof for any term or number of years, not exceeding *twenty-one* years, as to the premiſes in the ſaid county of *Wiltſhire*, and not exceeding *thirty-one* years as to the premiſes in the ſaid kingdom of *Ireland* in poſſeſſion, and not in reverſion, or by any way of future intereſt, and ſubject to the reſtrictions hereinafter mentioned; *and alſo* that it ſhall and may be lawful to and for them the ſaid *Andrew Thomas*, *Jeremiah Williams*, and *Samuel Keate*, reſpectively, from time to time, and at all times during their reſpective lives, and when they ſhall reſpectively be in poſſeſſion of or entitled to the rents and profits of the ſaid manor and hereditaments in the ſaid counties of *Hants* and *Somerſet*, by this my will deviſed as aforeſaid, by indentures, to be ſealed and delivered by them reſpectively, in the preſence of, and atteſted by two or more credible witneſſes, to make any demiſe or leaſe, demiſes or leaſes, of all or any part of ſuch hereditaments and premiſes in the ſaid counties of *Hants* and *Somerſet*, whereof they ſhall ſo reſpectively be entitled to the poſſeſſion or the rents and profits (except only my manſion-houſe at Mill Hill, with the appurtenances, and the lands and hereditaments occupied therewith) for any term or number of years not exceeding *twenty-one* years, in poſſeſſion, and not in reverſion, or by way of future intereſt. *Provided*, and ſo that there is reſerved in every ſuch future demiſe or leaſe of the premiſes, the beſt and moſt improved yearly rent and rents, to be incident to the immediate reverſion of the premiſes ſo to be demiſed, that can be had or obtained for the ſame, without taking any fine, premium, or forgift, or any thing in the nature of a fine, premium, or forgift for the making thereof, and ſo as there be contained in every ſuch demiſe, or leaſe, a condition of re-entry on non-payment of the rent thereby to be reſerved within twenty-one days after the ſame ſhall become payable, and ſo as the leſſee or leſſees to whom ſuch leaſe or leaſes ſhall be made, do execute a counterpart or counterparts thereof, and do thereby covenant for the due payment of the rent to be thereby reſpectively reſerved, and be not by any clauſe or words therein contained, made diſpuniſhable for waſte, or exempted from puniſhment for committing waſte, and ſo as there is contained in every ſuch leaſe ſtipulations under ſufficient penalties

for tilling, manuring, and managing the lands and premiſes thereby demiſed in a huſbandlike manner in all reſpects, according to the cuſtom of the county or place where the ſame ſhall reſpectively be ſituated.

No. XIII. *Power in a Will for Deviſees to ſell and exchange deviſed Eſtates with the Conſent of the Truſtees.*

PROVIDED alſo, and it is my further will and meaning, that it ſhall and may be lawful to and for the ſaid *Robert Atkins*, *Thomas Atkins*, and *Nicholas Moore*, reſpectively, from time to time, during their reſpective lives, as and when they ſhall reſpectively be entitled to the poſſeſſion or to the rents and profits of the ſaid manor and hereditaments hereby deviſed, with the conſent and approbation of the ſaid *Thomas Yates*, *William Sale*, and *Samuel Miles*, (*truſtees*) or the ſurvivors or ſurvivor of them, his executors and adminiſtrators, teſtified in writing, under their or his hands and ſeals, hand and ſeal, notwithſtanding any of the uſes, eſtates, limitations or truſts herein before deviſed, limited, and contained, to make ſale and diſpoſe of, or to convey in exchange for any other manor, meſſuage, lands, and hereditaments, free from incumbrances, to be ſituate ſomewhere in *England*, if the hereditaments which ſhall be conveyed in exchange are in *England*, or to be ſituated either in *England* or *Ireland*, if the hereditaments which ſhall be ſo conveyed in exchange are ſituate in *Ireland*, all or any part or parts of the ſaid manors, meſſuages, lands and hereditaments hereby deviſed, and the fee ſimple thereof, to any perſon or perſons whomſoever, and for the end or purpoſe of making any ſuch ſale or exchange by any deed or deeds, writing or writings, under the hand and ſeal of ſuch of them, the ſaid *Robert Atkins*, *Thomas Atkins*, and *Nicholas Moore*, as ſhall be then in poſſeſſion or entitled to the rents and profits of the ſaid manors and hereditaments hereby deviſed, atteſted by two or more credible witneſſes, and with ſuch conſent and approbation as laſt mentioned, to revoke and make void all and every the uſes, truſts, and limitations, powers and proviſoes hereinbefore deviſed, limited and contained, of and concerning the ſame premiſes reſpectively, or any part thereof, and to limit, declare or appoint ſuch new or other uſe or uſes, truſt or truſts, eſtate or eſtates, of and concerning the ſame, as ſhall be requiſite and neceſſary to effectuate ſuch ſale or exchange, but ſubject nevertheleſs and without prejudice to any leaſe or leaſes which ſhall then have been granted or demiſed of any of the ſaid deviſed premiſes, by virtue and in purſuance of the ſaid power hereinbefore in that behalf contained, or any of them; and it is my further will and meaning, and I declare that all and

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every the monies arising by such sale or sales aforesaid, shall be paid to and be received by them the said trustees, or the survivors or survivor of them, his executors or administrators, whom I do hereby authorise and employ upon payment of the money arising by sale or sales of any part of the said premises, to sign and give proper receipts for such purchase money; and I do hereby will and declare, that such receipt and receipts shall be a sufficient discharge to any purchaser or purchasers for so much of the purchase money as shall in such receipt or receipts be acknowledged or expressed to be received, and such purchaser or purchasers shall not afterwards be answerable for any loss, misapplication, or non-application of the said purchase money, or be in anywise concerned to see to the application thereof, which money is so to be paid to and received by the said trustees, or the survivors or survivor of them, his executors or administrators, *in trust*, to be by them or him forthwith, or as soon as conveniently may be, laid out and invested with the consent and approbation of the person or persons who for the time being shall be entitled to the rents of my said real estates, in the purchase of other manors, messuages, lands and tenements, or hereditaments, in fee simple, free from incumbrances, to be situated somewhere in *England*, or to be situate either in *England* or *Ireland*, if the hereditaments which shall be so sold for such money, be in *Ireland*, and that thereupon as well the manors, messuages, and hereditaments so to be purchased, as all and every the manors, messuages, lands and hereditaments which shall come or be taken by way of, or in exchange for any part of the said premises hereby devised as aforesaid, shall be settled, conveyed, and assured to such and the same trusts, and under and subject to such and the same charges, powers, provisoes, limitation and conditions, as under and by virtue of the limitations in this my will they stood limited, or were declared and subsisting at or immediately before the time of such sale or sales respectively, of and concerning the hereditaments so sold, or to, for, upon and subject to such, and so many of them as shall be then undetermined and capable of taking effect except only this present power of selling and exchanging.

No. XIV. *Directions in a Will, that if by bad Debts or otherwise the Testator's Estate shall become insufficient to pay Children's Legacies, they shall sustain the Loss equally.*

AND my will further is, that in case the said several legacies or sums of two hundred pounds a piece hereinbefore given and made payable to my said three children in manner aforesaid, shall by reason or on account of any debt or debts due and owing, or which hereafter may grow due and owing to my personal

eſtate, or by any other loſſes, misfortunes, or means whatſoever, my ſaid eſtate ſhall prove or become inſufficient to anſwer and pay to my ſaid three children, or any of them, their reſpective full legacies of two hundred pounds a piece, at the times and in the manner hereinbefore directed and appointed for payment thereof, then and in ſuch caſe I do hereby order, will, direct, and appoint, that all ſuch loſſes or deficiencies ſo happening to my ſaid eſtate ſhall be borne and ſuſtained by all and every my ſaid three children, who ſhall then be entitled to the ſaid legacies of two hundred pounds a piece, and that in equal proportions, ſhare and ſhare alike, any thing in this my will contained to the contrary thereof in anywiſe notwithſtanding.

## No. XV. *A Nuncupative Will.* (a)

THE following is the laſt will and teſtament, in writing, of *Jacob Finch*, late of *Wimbledon*, in the county of *Somerſet*, gent. deceaſed, who whilſt of ſound and diſpoſing mind, declared the ſame to us whoſe names are hereunto ſubſcribed, deſiring it might be conſidered and taken to be his laſt will and teſtament, and requeſting we would bear witneſs thereto. *(Here inſert the words of the teſtator.)*

*Benjamin Fanſhaw*, of *Fleet-ſtreet*, *London*.
*Iſmael Williams*, *Charles Fenchell*, } of *Wimbledon*, aforeſaid.

## No. XVI. *A Codicil to deviſe Lands purchaſed ſince the Teſtator's Will, to the Uſes of ſuch Will—to add a new Truſtee thereof, and appoint Guardians to his Children.*

WHEREAS I *Samuel Knapp*, of, &c. have by my laſt will and teſtament, bearing date the 20th day of May 1796, given and deviſed all my lands and hereditaments ſituated in the county of *Bedford*, unto *William Nillingford* and *John Tyler*, their heirs and aſſigns, upon ſuch truſts, intents, and purpoſes as are therein declared concerning the ſame. And whereas ſince the making and publiſhing this my ſaid will, I have purchaſed certain other meſſuages, lands, and hereditaments ſituated in or near *Holling* in the ſaid county of *Bedford*. Now I do hereby give and deviſe all the ſaid lands and hereditaments ſituated at or near *Holling* aforeſaid, which I have purchaſed ſince the execution of my ſaid will, as alſo the meſſuages, lands, and hereditaments in my ſaid will heretofore given and deviſed as aforeſaid, unto and to the uſe of the ſaid *William*

(a) See *ante*, p. 26.

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*Nillingford* and *John Tyler*, and unto *William Mages* of, &c. their heirs and aſſigns for ever, upon ſuch truſts, nevertheleſs, and to and for ſuch ends, intents, and purpoſes as in and by my ſaid will are expreſſed and declared of and concerning the ſaid meſſuages, lands, and hereditaments thereby deviſed unto the ſaid *William Nillingford* and *John Tyler*, their heirs and aſſigns as before mentioned. And I do hereby alſo appoint the ſaid *William Mages*, one of the executors of my ſaid will, together with the ſaid *William Nillingford* and *John Tyler* already thereby appointed executors thereof. Alſo I appoint them the ſaid *William Nillingford*, *John Tyler*, and *William Mages*, guardians of the perſons and eſtates, rights, and intereſts, of my ſaid three children *John*, *Richard*, and *William*, until they ſhall ſeverally attain their reſpective ages of twenty-one years. And I do hereby declare this preſent writing to be by me intended to be a codicil to my ſaid laſt will and teſtament, and the ſame ſhall be deemed and taken as part thereof, as fully and effectually to all intents and purpoſes as if the contents hereof had been actually inſerted and compriſed in the ſaid will. In witneſs whereof I the ſaid *Samuel Knapps* have hereunto ſet my hand and ſeal this 28th day of *April* 1798.

*Samuel Knapps*, (L. S.)

Signed, ſealed, publiſhed, &c.
*Fen. Milliardet*, of, *&c.*
*Richard Obertoon*, of, *&c.*

## No. XVII. *A ſhort Releaſe or Renunciation of an Executorſhip.*

TO all to whom this preſent writing ſhall come, *Samuel Diſney*, clerk, doctor in divinity, ſendeth greeting; whereas *John Faines* of, &c. in the county, &c. deceaſed, did make his laſt will and teſtament in writing on or about, &c. in the year of our Lord God, &c. and thereby made *Sarah* his wife and the ſaid *Samuel Diſney* executors thereof, as by ſuch laſt will and teſtament may appear, now know ye, that the ſaid *Samuel Diſney* for divers good cauſes and conſiderations him thereunto moving hath renounced and releaſed, and by theſe preſents doth renounce and releaſe the ſame executorſhip; and doth refuſe and diſclaim to take upon him the burthen thereof, or the probate of the ſaid will: and further the ſaid *Samuel Diſney* for himſelf, his executors and adminiſtrators, doth covenant and grant to and with the ſaid *Sarah Faines*, relict of the ſaid *John Faines* deceaſed, her executors and adminiſtrators, that he the ſaid *Samuel Diſney* ſhall not nor will henceforth act or intermeddle in the ſaid executorſhip or in any of the eſtates or effects of the ſaid *John Faines* deceaſed, by reaſon thereof.

In witneſs whereof the ſaid *Samuel Diſney* hath hereunto ſet his hand and ſeal the 26th day of January 1798.

*Samuel Diſney*, (L. S.)

Signed, ſealed, &c.
*Richard Willis*, of, &c.
*John Townſhend*, of, &c.

No. XVIII. *A Confirmation of a Will.*

(Indorſed on the back thereof.)

WHEREAS ſince the making my laſt will and teſtament, as within mentioned, I have taken to myſelf a wife, by which the ſame, or part thereof, might be deemed void in law: Now I do, notwithſtanding the ſaid circumſtance, in all reſpects confirm and re-eſtabliſh my aforeſaid will, and deſire the ſame may ſtill be deemed and taken to be my laſt will and teſtament.

As witneſs my hand and ſeal, this twentieth day of *July* one thouſand ſeven hundred and ninety-four.

*Sabel James*, (place of ſeal.)

Signed, ſealed, publiſhed, &c.
*John Conner*,
*Thomas Fell*,
*Thomas Timms*. } of *Finch-ſtreet, Mary-le-bone.*

No. XIX. *An Account of the Stamps required by Act of Parliament to be impreſſed on Diſcharges for Legacies, and diſtributive Shares of Perſonal Property.*

BY 20th Geo. 3. c. 28, as altered by 23 of ſame reign, c. 58. and 29 *ibid.* c. 51, it is provided that on all diſcharges of legacies or diſtributive ſhares of perſonal property, there ſhall be impreſſed the following duties, *viz.*

If the legacy or ſhare be

| | £. | s. | d. |
|---|---|---|---|
| Of or under the value of 20l. the ſum of | 0 | 5 | 0 |
| Above 20l. and under 100l. — — | 0 | 10 | 0 |
| 100l. and under 200l. — — — | 2 | 0 | 0 |
| 200l. and under 300l. — — — | 3 | 0 | 0 |
| 300l. and under 400l. — — — | 4 | 0 | 0 |

and for every further ſum of 100l. the additional duty of 2l. for each hundred.

and for every ſum above 1000l. an additional duty of 20l. for each thouſand.

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But diſcharges from the *wife, children, and grand-children* of the teſtator, or of the inteſtate, are by the aforeſaid ſtatutes exempted from the above duties, and inſtead thereof are chargeable with the following, *viz.*

| | £. | s. | d. |
|---|---|---|---|
| For any legacy or ſhare of the value of 20l. or under — — — | 0 | 2 | 6 |
| Above 20l. and under 100l. — — | 0 | 5 | 0 |
| 100l. and upwards — — — | 1 | 0 | 0 |

BUT by 36 Geo. 3, c. 52, (which ſee ante p. 85.) the above acts of 20, 23, and 29, Geo. 3, are in part repealed, and other duties impoſed in lieu of thoſe by ſuch acts granted; and for the prevention of miſtakes and inconveniences in the receipt and payment of legacies and ſhares of perſonal eſtates, in purſuance of ſuch act of 36th Geo. 3. the commiſſioners of ſtamps have iſſued the following obſervations and abſtract, viz.

The duties granted by the above act do not attach upon legacies and perſonalty left by teſtators and inteſtates who died on or before the 26th of *April*, 1796.

That legacies under the amount or value of 20l. and ſhares of perſonal eſtates under the clear value of 100l. are ſubject only to the former duties.

That the duties upon legacies and ſhares of perſonalty taken by huſbands, wives, children, and grand children, or any lineal deſcendants, remain alſo unaltered by this act;

That *ſtamped receipts* muſt therefore continue to be taken, as before, for payments in the ſeveral caſes before-mentioned; which ſtamps may be had, as uſual, at the head office, and at the offices of the ſeveral diſtributers and ſub-diſtributers in the country; but,

That, *in all other caſes*, receipts muſt be taken on *unſtamped* paper or parchment; and muſt within twenty-one days from the date be brought to the head office in London, or to the ſaid diſtributers or deputies, in order to their being ſtamped; and the duty muſt be paid on leaving ſuch receipts.

THE new duties payable by the ſaid act of 36 Geo. 3. are,

2l. *per cent.* on all legacies, ſpecific and pecuniary, of 20l. value or amount, or more, and on every clear reſidue, or ſhare of the clear reſidue, of a perſonal eſtate, or ſhare therein, of the amount or value of 100l. or upwards, given or paſſing to brothers or ſiſters of the deceaſed or their deſcendants.

. *per cent.* on ditto to uncles or aunts or their deſcendants.

4l. *per cent.* on ditto to great uncles or great aunts or their deſcendants.

And 6l. *per cent.* on ditto to any other collateral relation or any ſtranger in blood to the deceaſed. *As will be more fully ſeen by the abſtract of the act given in the preceding pages.*

No. XX. *The Form of a common Receipt for a Legacy* (*a*).

Received, the ſixth day of *June*, one thouſand ſeven hundred and ninety-four, of *Jeremiah Simpſon*, eſquire, and *James Johnſon*, gentleman, executors of the laſt will and teſtament of *Samuel Ruſſell*, late of *Bedford ſquare*, merchant, deceaſed, the ſum of fifty pounds; being in full for a legacy to that amount given to me in and by the ſaid will of the ſaid *Samuel Ruſſell*, bearing date the tenth day of *Auguſt*, one thouſand ſeven hundred and ninety-three.

As witneſs my hand,

*William Peters.*

Witneſs,
*Thomas Fill.*

No. XXI. *A more regular and formal Diſcharge for a Legacy.*

To all to whom theſe preſents ſhall come, I *William Peters*, of *Theobald's-Road*, in the pariſh of *Saint George the Martyr*, in the county of *Middleſex*, baker, ſend greeting: WHEREAS *Samuel Ruſſell*, late of *Bedford ſquare*, in the aforeſaid county, merchant, deceaſed, in and by his laſt will and teſtament in writing, bearing date on or about the tenth day of *Auguſt*, which was in the year of our Lord one thouſand ſeven hundred and ninety-three did give and bequeath unto me the ſaid *William Peters* the ſum of fifty pounds; and conſtituted *Jeremiah Simpſon*, and *James Johnſon*, of *Iſlington*, in the ſaid county of *Middleſex*, gentlemen, executors of his ſaid will: Now know ye that I the ſaid *William Peters* do hereby acknowledge to have received of and from the ſaid *Jeremiah Simpſon* and *James Johnſon* the ſaid ſum of fifty pounds, ſo given and bequeathed to me by the will of the ſaid *Samuel Ruſſell* as aforeſaid, and thereof, and of and from the ſame, and every part thereof, do fully and abſolutely acquit, releaſe, exonerate, and for ever diſcharge the ſaid *Jeremiah Simpſon* and *James Johnſon*, and each of them, their and each and every of their heirs, execu-

(*a*) See the proper ſtamps on which receipts and diſcharges for legacies are to be written, *ante* No. XIX.

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tors, adminiſtrators, and aſſigns, and alſo the eſtate and effects of the ſaid *Samuel Ruſſell*, deceaſed, and every part thereof: And I the ſaid *William Peters* do hereby, for myſelf, my executors, adminiſtrators, and aſſigns, and for every of them, remiſe, releaſe, and for ever quit claim unto the ſaid *Jeremiah Simpſon* and *James Johnſon*, their heirs, executors, and adminiſtrators, and every of them, all and all manner of action and actions, cauſe and cauſes of action, ſuits, legacies, ſum and ſums of money, judgments, executions, claims, and demands whatſoever, both at law and in equity, which I the ſaid *William Peters* now have, or at any time heretofore had, or which I, my executors, adminiſtrators, or aſſigns, hereafter may have, claim, challenge, or demand, againſt the ſaid *Jeremiah Simpſon* and *James Johnſon*, or either of them, as executors as aforeſaid, their or either of their heirs, executors, or adminiſtrators, or the eſtate and effects of the ſaid *Samuel Ruſſell*, deceaſed, for, by reaſon, or on account of the ſaid ſum of fifty pounds, ſo given and bequeathed to me in and by the laſt will and teſtament of the ſaid *Samuel Ruſſell*, deceaſed, or any part thereof.

IN WITNESS whereof I the ſaid *William Peters* have hereunto ſet my hand and ſeal, this ſixth day of *June*, one thouſand ſeven hundred and ninety-four.

*Wm. Peters*, (place of ſeal.)

Sealed and delivered in the preſence of

*John Mimms*,
*Samuel Gill.* } *Bedford-ſquare.*

XXII. *The Form of an Inventory of the Goods and Chattels of the Deceaſed, to be exhibited to the Ordinary by an Executor or an Adminiſtrator, purſuant to the Oath and Bond entered into at the Time of obtaining Probate or Adminiſtration* (*a*).

A TRUE and perfect inventory of all and every the goods and chattels, as well moveable as not, debts, credits, and other perſonal eſtate and effects, of *Jacob Simpſon*, late of the pariſh of *Matlock*, in the county of *Cambridge*, in the dioceſe of *Ely*, gentleman, deceaſed; made by us whoſe names are hereunto ſubſcribed, the 10th day of *January*, in the year of our Lord Chriſt one thouſand ſeven hundred and ninety-five.

| | £. | s. | d. |
|---|---|---|---|
| Money in the houſe, the property of the deceaſed | 50 | 0 | 0 |
| 677*l.* 3 *per cent.* conſol. bank annuities, at 75 — | 500 | 0 | 0 |
| Money on mortgage to *James Sell*, eſq. of *Banbury* | 600 | 0 | 0 |
| 4 horſes — — — — | 90 | 0 | 0 |
| 6 cows and one bull — — — | 70 | 0 | 0 |
| 50 ſheep, at *per* average 1*l.* — — | 50 | 0 | 0 |
| 3 ſwine, at ditto — — — | 3 | 0 | 0 |
| Poultry — — — — | 2 | 0 | 0 |
| Corn growing — — — | 80 | 0 | 0 |
| Corn and hay in barns and outhouſes — — | 20 | 0 | 0 |
| Carts and implements of huſbandry — — | 30 | 0 | 0 |
| Wearing apparel — — — | 15 | 0 | 0 |
| Books — — — — | 8 | 0 | 0 |
| Plate — — — — | 10 | 0 | 0 |
| Houſehold furniture — — — | 100 | 0 | 0 |
| Leaſe for 21 years from *Michaelmas* 1785, of the teſtator's houſe of reſidence — — | 60 | 0 | 0 |
| Rent in arrear due to the deceaſed, for a houſe ſituate No. 35, *Welbeck-ſtreet*, *Cavendiſh-ſquare*, *London* — — — | 40 | 0 | 0 |
| Miſcellaneous other debts, due to the deceaſed, ſuppoſed recoverable — — — | 18 | 0 | 0 |
| Total — | 1,746 | 0 | 0 |
| Debts due to the deceaſed, but ſuppoſed to be irrecoverable — — — — | 59 | 2 | 6 |
| Debts owing by the deceaſed at the time of his death | 16 | 4 | 2 |

Taken and appraiſed by us, the day and year firſt above written.

*William Maſon*, } of *Matlock*, ſworn
*Peter Fairwell*, } appraiſers.

(*a*) This inventory, purſuant to ſeveral acts of parliament, *muſt* be written on *ſtamped* paper or parchment.

APPENDIX.

No. XXIII. *An Account of the uſual Expences of taking out Adminiſtration and obtaining Probate of a Will, as well in the common Form as by Commiſſion* (*a*).

| Where the Value of the Goods, Chattels and Credits of a petty Officer, common Seaman, or Marine, in the King's Service, is | In Common Form. | | | | | | By Commiſſion. | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Probates. | | | Adminiſtrations. | | | Probates. | | | Adminiſtrations. | | |
| £. | £. | s. | d. | £. | s. | d. | £. | s. | d. | £. | s. | d. |
| Under 10 | No adminiſtration is neceſſary. | | | | | | | | | | | |
| £. Under 20 | 0 | 6 | 0 | 0 | 14 | 0 | 0 | 18 | 0 | 1 | 6 | 0 |
| 20, and under 40 | 0 | 19 | 6 | 1 | 7 | 0 | 1 | 15 | 0 | 2 | 3 | 0 |
| 40, and under 60 | 1 | 3 | 0 | 1 | 11 | 0 | 1 | 19 | 6 | 2 | 7 | 6 |
| 60, and under 100 | 1 | 7 | 6 | 1 | 15 | 6 | 2 | 6 | 0 | 2 | 14 | 0 |
| With reſpect to all other Perſons, where the Value of the Goods, &c. is | | | | | | | | | | | | |
| £. Under 5 | 0 | 8 | 6 | 0 | 9 | 6 | 0 | 17 | 0 | 0 | 18 | 0 |
| 5, and under 6 | 0 | 15 | 6 | 1 | 2 | 6 | 1 | 13 | 0 | 1 | 19 | 8 |
| 6, and under 20 | 1 | 2 | 0 | 1 | 9 | 6 | 2 | 1 | 0 | 2 | 8 | 0 |
| 20, and under 40 | | | | 2 | 4 | 0 | | | | 3 | 6 | 8 |
| 40, and under 100 | 2 | 3 | 0 | 2 | 14 | 6 | 3 | 11 | 8 | 3 | 17 | 4 |
| 100, and under 300 | 4 | 13 | 0 | 5 | 7 | 10 | 6 | 4 | 8 | 6 | 10 | 4 |
| 300, and under 600 | 8 | 3 | 0 | 8 | 17 | 10 | 9 | 14 | 8 | 10 | 0 | 4 |
| 600, and under 1000 | 11 | 1 | 4 | 11 | 16 | 2 | 12 | 13 | 0 | 12 | 18 | 8 |
| 1000, and under 2000 | 18 | 2 | 10 | 18 | 17 | 8 | 19 | 17 | 10 | 20 | 3 | 6 |
| 2000, and under 5000 | 25 | 2 | 10 | 25 | 17 | 8 | 26 | 17 | 10 | 27 | 3 | 6 |
| 5000, & under 10,000 | 37 | 2 | 10 | 37 | 17 | 8 | 38 | 17 | 10 | 39 | 3 | 6 |
| Above 10 000 | 48 | 16 | 2 | 49 | 11 | 0 | 50 | 11 | 2 | 50 | 16 | 10 |

It is to be obſerved however that the above fees, &c. apply only to ſuch wills as are very ſhort. If they be more than three or four ſheets (each ſheet containing ninety words) there will be an additional expence of about 2s. a ſheet, and there will alſo be an additional expence of about 25s. in caſe the will is not ſubſcribed by two witneſſes.

(*a*) A commiſſion is granted to take probate where the executor is ill, or where he lives in the country, and the probate is grantable in London.